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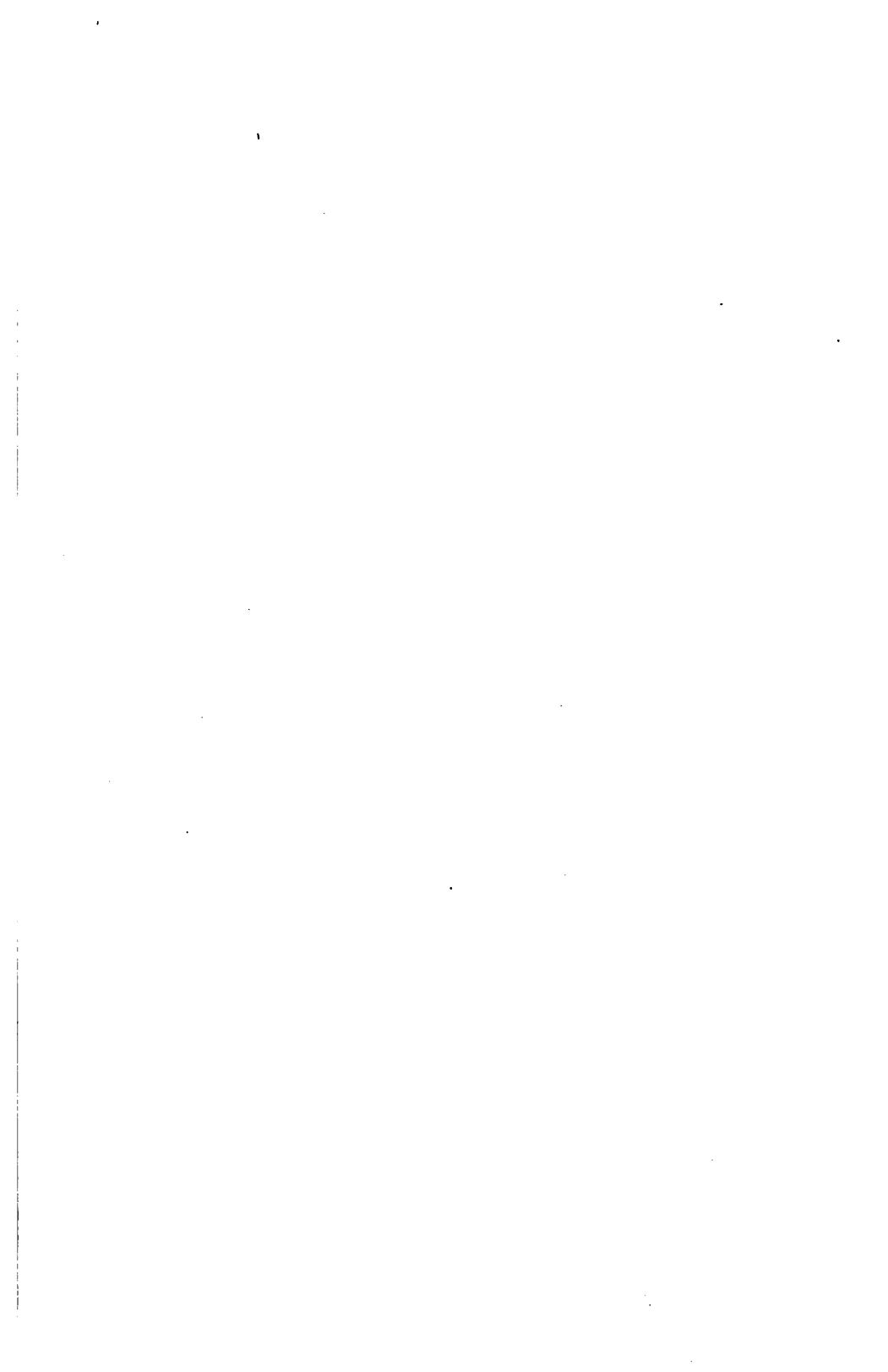
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WASHINGTON REPORTS
VOL. 83
CASES DETERMINED
IN THE
SUPREME COURT
OF
WASHINGTON

DECEMBER 22, 1914 — FEBRUARY 1, 1915

ARTHUR REMINGTON
REPORTER

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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*Succeeded Judge Crow as Chief Justice, January 11, 1915.

†Succeeded Judge Gose (term expired) January 11, 1915.

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*Appointed January 2, 1915, to succeed O. R. Holcomb, resigned.

†Succeeded Chas. Ethelbert Claypool (term expired) January 11, 1915.

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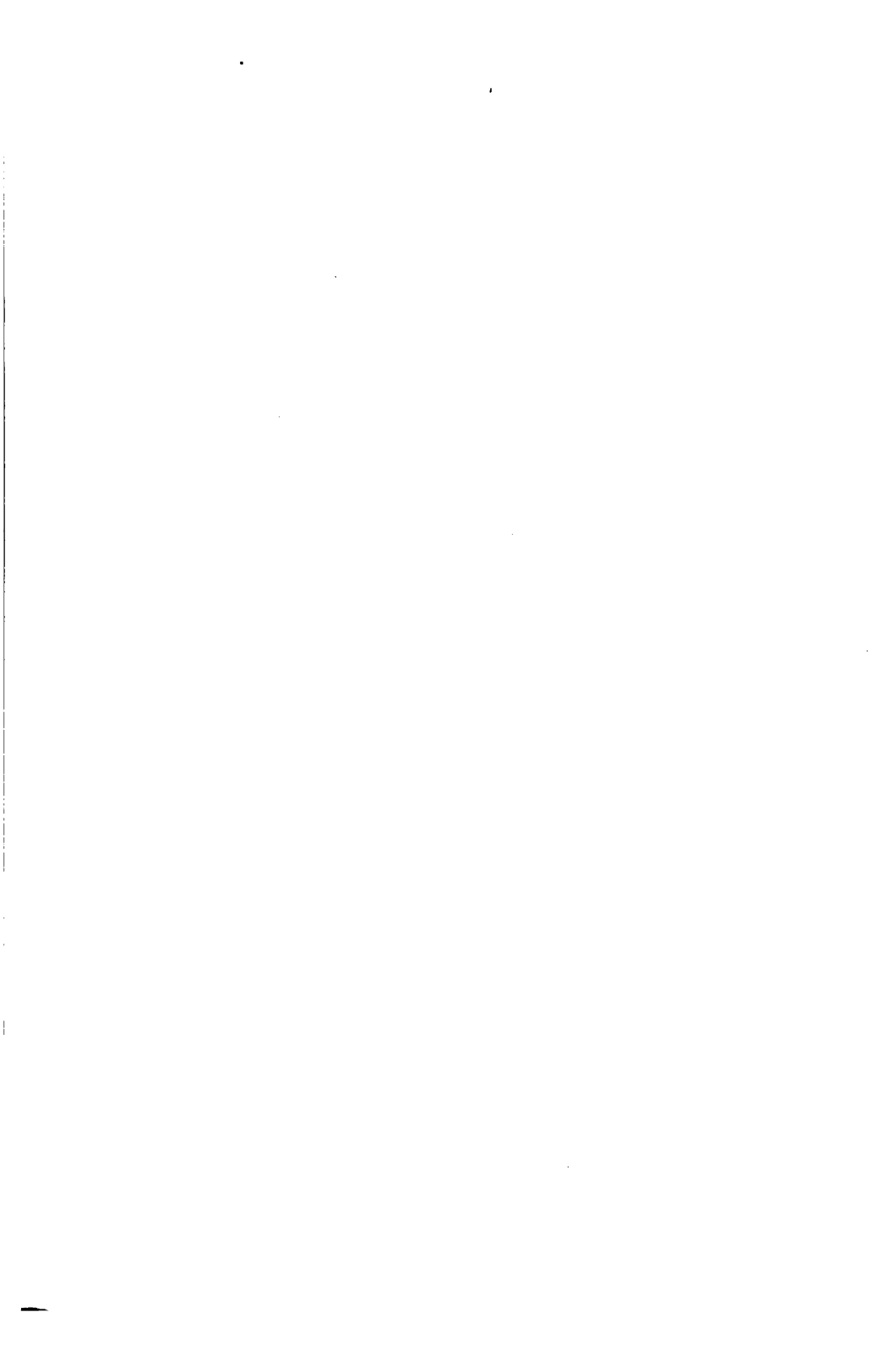
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ERRATA

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Page 675, line 14 from bottom, for submitted read subjected



CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 12125. Department Two. December 22, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. MARY M.
JOHNSTON, *Appellant*.¹

CRIMINAL LAW — TRIAL — SELECTION OF JURY — NUMBER OF CHALLENGES — "CAPITAL OFFENSES" — STATUTES — CONSTRUCTION. Under Rem. & Bal. Code, § 2138, providing that, in prosecutions for capital offenses, the defendant may challenge peremptorily twelve jurors, and six jurors in prosecutions for offenses punishable by imprisonment in the penitentiary, "capital offenses" refers only to those punishable by death; and the death penalty having been abolished, the right to twelve peremptory challenges is suspended; and the fact that the crime was committed prior to the abolishment of the death penalty is immaterial, where the accused was not insisting on the application of the capital penalty.

SAME—APPEAL—PRESERVATION OF GROUNDS—MISCONDUCT OF COUNSEL—RECORD—WAIVER OF ERROR. Error in misconduct of the prosecuting attorney in his argument to the jury cannot be urged where the only foundation laid was exceptions to the alleged use of certain language, it was not claimed that the misconduct was so flagrant that it could not be cured by instructions, no instructions were requested, and the offending language was not preserved in the record.

APPEAL—RECORD—AFFIDAVITS. Misconduct of counsel in argument to the jury occurring in the presence of the court cannot be shown on appeal by affidavits setting forth the acts constituting such misconduct; since the language used must be certified to by the trial judge.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 27, 1913, upon a trial and conviction of murder. Affirmed.

¹Reported in 144 Pac. 944.

Robertson & Miller, Rosenhaupt & Grant, and Harry L. Cohn, for appellant.

Geo. H. Crandell and F. M. Goodwin, for respondent.

ELLIS, J.—The defendant was charged with the crime of murder in first degree, which it is alleged she committed on April 29, 1913, in Spokane county, by then and there administering to her son, Raymond O. Johnston, strychnine, with premeditation to compass his death.

The cause came on for trial on June 19, 1913. On June 26, 1913, the jury returned a verdict finding the defendant guilty as charged in the information. The defendant moved for a new trial, and also moved in arrest of judgment. Both of these motions were overruled. From the judgment of conviction and sentence to confinement at hard labor in the penitentiary for a period not less than the term of her natural life, the defendant prosecutes this appeal.

It is claimed that the court erred (1) in refusing to permit the appellant to exercise more than six peremptory challenges in selecting the jury; (2) in refusing to grant a new trial on the ground of misconduct of the prosecuting attorney in the course of his argument to the jury.

I. The first objection is merely stated without argument or sustaining authority. We assume, however, that it is based upon the statute, Rem. & Bal. Code, § 2138 (P. C. 135 § 1167), which, so far as pertinent, reads:

“In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors.”

It is clear that the twelve challenges are only allowed in prosecutions for capital offenses. A capital offense is one which may be punishable with death. Black's Law Dictionary (2d ed.), p. 167. *Ex parte Walker*, 28 Tex. App. 246, 13 S. W. 861; *Ex parte McCrary*, 22 Ala. 65; *Ex parte Dusenberry*, 97 Mo. 504, 11 S. W. 217. The statute above

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quoted obviously uses the term "capital offenses" as so defined. The second clause, by allowing only six peremptory challenges in prosecutions for offenses punishable by imprisonment in the penitentiary, in effect defines such offenses as not capital. Capital punishment was abolished in this state by the act approved March 22, 1913, Laws 1913, p. 581 (3 Rem. & Bal. Code, § 2392), which went into effect on June 9, 1913, ten days before this case was called for trial. The first clause of the statute relating to peremptory challenges above quoted was clearly suspended by the abolition of capital punishment. Since there is now no capital punishment in this state, there are no capital offenses, hence no offense in prosecution for which the provision for twelve peremptory challenges can be invoked. No amount of argument could add to the clear sequence of this conclusion.

It is intimated by counsel that, inasmuch as the law abolishing capital punishment went into effect after the commission of the crime though before the trial, the twelve peremptory challenges should have been allowed. The suggestion loses all point when it is remembered that the appellant was not insisting upon the application of the capital penalty in case of her conviction. She can hardly repudiate the one result and claim the other.

II. At the close of the argument and when the jury had retired for deliberation, the following took place in open court:

"Mr. Cohn: We desire to except to the statement made by Mr. Crandell that the defendant has been slowly poisoning the deceased by arsenical poisoning, and this fact was communicated to the attorneys for the defendant and they in turn refused to permit the doctor to testify to his symptoms, as being the highest error that could be committed.

"The Court: The exception is allowed.

"Mr. Cohn: And we further except to the statement that, if the prosecution had been permitted to, they could have shown other evidence, and the further statement meaning the

plaintiff had not been permitted to show everything, as being clearly error.

"The Court: The exception is allowed. I do not recall that second statement that you refer to.

"Mr. Cohn: If your honor will recall, that is when I got up and branded it as a falsehood, when he said in all probabilities—

"The Court: Yes, I remember.

"Mr. Miller: And we desire to except to the closing remarks of counsel wherein he spoke of the heinousness of the offense and of the crime and the necessity of the jury performing their duty as the coroner had performed his, the prosecutor his, and they should theirs, as a statement to the jury that the belief of the prosecutor was that the defendant was guilty, and the further numerous statements of the prosecutor as to what he believed the evidence was.

"The Court: The exceptions are allowed.

"Mr. Cohn: Using the expression right in that connection repeatedly throughout his argument that he believed with all his heart certain things.

"Mr. Crandell: The court will not, of course, certify to this without permitting us to offer our amendments?

"The Court: No.

"Mr. Crandell: The exceptions are allowed?

"The Court: The exceptions are allowed.

"Mr. Crandell: We simply want an opportunity when it comes to making up the statement."

This is all that can be found in the record proper touching the incident.

It will be observed that counsel did not ask for an instruction that the jury disregard the alleged statements, did not ask that the jury be discharged from further consideration of the case, did not claim that the misconduct was so flagrant as not to be cured by an instruction to disregard, but contented himself with a formal exception. Something more than a mere exception is essential. *State v. Meyerkamp*, 82 Wash. 607, 144 Pac. 942.

It will also be observed that the context and occasion of the offending language is not preserved in the record, nor even what purports to be the exact language used. The

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prosecuting attorney did not admit its use nor did the trial judge express any definite opinion on the matter. This phase of the case is ruled by our decision in *State v. Jakubowski*, 77 Wash. 78, 137 Pac. 448, where we said:

"This objection is unavailing for two reasons. In the first place, the alleged objectionable remarks were made in the presence of the court. They could have been, and should have been, preserved in the record in context, and certified by the trial judge as actually having been made. As the record stands, the trial judge merely certified that counsel for appellant claimed that they were made, and objected thereto."

These considerations clearly distinguish this case from the situation presented in *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486. There the whole of the offending argument was preserved in the record in its context, and was certified by the trial judge as having been made, in so many words. The distinction is too plain to require comment.

It is true that a copy of an affidavit of one of the attorneys for the appellant appears in the statement of facts in which he sets out what he claims to be the substance of the objectionable statements, but these things are denied by an affidavit of the prosecuting attorney in which the purport of what he claims he said is set out in materially different terms from those claimed by the other side, and in a connection which would render it legitimate argument based upon the evidence which was to the effect that certain symptoms of the deceased indicated slow arsenical poisoning. Such argument is always permissible. *State v. Peebles*, 71 Wash. 451, 129 Pac. 108. There is nothing in the whole of the record indicating any opinion of the trial judge as to the correctness of either of these versions, beyond the significant fact that, in his order overruling the motion for a new trial he makes no reference to any affidavit filed in support of the motion. It is reasonable to assume that he acted upon his own knowledge of what actually occurred. Moreover these affidavits

are not referred to in the motion for a new trial so as to be identified thereby, nor are they referred to in the judge's certificate to the statement of facts. The motion merely states that it will be supported by affidavits "to be filed" and the judge's certificate merely directs that the exhibits referred to in the statement of facts be attached thereto. It makes no reference to any affidavit used or offered on the motion for a new trial. It is extremely doubtful whether these affidavits are sufficiently identified in any manner to constitute any part of the certified record. *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28.

Be that as it may, we cannot, in any event, under the repeated decisions of this court, consider these affidavits. Whatever the true purport of the incident complained of, it occurred in the immediate presence and hearing of the trial court. What actually occurred was a matter peculiarly within the knowledge of the trial judge. Either a stenographic report of the argument or a statement of the trial judge as to what was its purport, would have given it to us from an authentic source. It would have been easy to have preserved the language in context, either by the court stenographer, or by a request that the judge reduce it to writing in such form that he could certify it as the substance and connection of what was actually said. The case falls directly within the rule announced in *Maryland Casualty Co. v. Seattle Elec. Co.*, 75 Wash. 430, 134 Pac. 1097; and followed in *Loy v. Northern Pac. R. Co.*, 77 Wash. 25, 137 Pac. 446. In the first of these cases touching the use of affidavits under the statute governing motions for a new trial, we said:

"It will be noted that some of the situations contemplated by the first three of the grounds for a new trial might arise upon matters occurring in open court during the progress of the trial, and the facts would then appear as a part of the record. In such a case, it is obvious that affidavits presenting such facts would be unnecessary and improper. Other situations contemplated by any one of these four subdivisions might arise out of matter not occurring in open court during

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the progress of the trial, and hence not appearing in the record. In such a case, evidence *aliunde* the record would be not only proper but necessary to any disclosure of the facts relied upon for a new trial."

In the *Loy* case, touching a situation the exact analogue of that here presented, we said:

"On the question of the misconduct of counsel, it appears that the objectionable remarks were made in the presence of the court during the trial and might have been preserved, either by the stenographer, or upon request the court itself might have reduced them to writing. This, however, was not done. Upon motion for new trial, the defendant's counsel, by affidavit, set forth his version of the objectionable remarks. The plaintiff's counsel answered, denying and setting forth their version of the same. The trial judge has included both affidavits in the statement of facts but does not certify as to which, if either, correctly contains the substance of the language used. The language having been used in the presence of the court, it should have been certified to by the court and made a part of the statement of facts. To permit such facts to be presented by affidavits gives rise to an unseemly contest between counsel upon matters that occurred in open court during the progress of the trial, and in the interest of orderly procedure should not be tolerated. The objectionable language not having been preserved in the statement of facts, it cannot here be reviewed."

The language there quoted from *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. 606, 38 N. W. 520, is also peculiarly pertinent here. See, also, *State v. Jakubowski*, *supra*, and *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20. Viewing the matter from whatever angle we may, we fail to find a sufficient predicate in the record to sustain the claim of prejudicial misconduct.

The motion for a new trial was based upon many grounds. No other grounds than those which we have discussed are, however, argued in the appellant's brief. The evidence of guilt, though circumstantial, tended strongly to establish every element of the crime as charged. In fact, it is not

seriously contended that it was insufficient to sustain the verdict. The court's instructions to the jury were concise, clear and free from error. No question is raised as to their sufficiency or correctness.

The judgment is affirmed.

Crow, C. J., MOUNT, MAIN, and FULLERTON, JJ., concur.

[No. 12191. Department Two. December 22, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES
MERRILL, *Appellant*.¹

BUILDING AND LOAN ASSOCIATIONS—OFFENSES—DOING BUSINESS WITHOUT AUTHORITY—INFORMATION—SUFFICIENCY—STATUTORY PROVISIONS. An information charging the defendant, as an agent and employee, with conducting a savings and loan business in this state when the company he represented was not authorized to do business in this state, by then and there selling and knowingly causing to be sold and issued to one L. one certain contract and share of his said company, then and there being a foreign building and loan association not theretofore or then lawfully engaged in said business in this state, sufficiently states an offense under 3 Rem. & Bal. Code, § 3601-23, forbidding such companies from conducting the business of a savings and loan association in this state, and Id., § 3601-27, providing that every agent or employee who shall willfully violate any of the provisions of the act shall be guilty of a misdemeanor; but it does not state an offense under Id., § 3601-22 relating to the sale of "stock" of such an association while it did not have on deposit with the state auditor the required amount of securities; since the sale of "capital stock" was not charged, but only the sale of a contract certificate share, and the doing of business in this state without authority.

CONSTITUTIONAL LAW—POWERS—DELEGATION OF JUDICIAL AND LEGISLATIVE POWERS—STATE AUDITOR—CONTROL OVER BUILDING AND LOAN ASSOCIATIONS. Building and loan and savings and loan associations, being in their nature public associations doing business with the public, and subject to the control of the legislature, the state auditor may be empowered to examine and audit their accounts and in connection therewith perform such other duties as are necessary to a

¹Reported in 144 Pac. 925.

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Syllabus.

full and fair control of their business; hence 3 Rem. & Bal. Code, § 3601-1 *et seq.*, containing such provisions, is not unlawful delegation of judicial and legislative powers to the state auditor, and does not violate Const., art. 3, § 20, providing that the state auditor shall be auditor of public accounts, and shall have such other powers and perform such other duties "in connection therewith" as may be prescribed by law.

COMMERCE—WHAT CONSTITUTES—CONTRACTS OF SAVINGS AND LOAN ASSOCIATIONS. The usual contracts of foreign savings and loan associations are not interstate nor foreign commerce, and when delivered, become local transactions, subject to and governed by the local law; hence the savings and loan association act is not a burden upon interstate commerce.

CONSTITUTIONAL LAW—DUE PROCESS — DISCRIMINATION — REGULATION OF FOREIGN CORPORATIONS. Since a foreign corporation has no legal existence beyond the limits of its home state, except as expressly granted to it by the laws of another state, the exclusion of foreign building and loan and savings and loan associations from doing business in this state is not in violation of the due process of law, denial of equal protection, and unlawful discrimination clauses of the Federal constitution.

CONSTITUTIONAL LAW—CLASS LEGISLATION—BUILDING AND LOAN ASSOCIATIONS—REGULATION. The building and loan and savings and loan association act, 3 Rem. & Bal. Code, § 3601-1 *et seq.*, is not void as class legislation in that it makes it a crime for any person within the state to sell stock of such associations, while the stock of other associations may be sold, since it does not discriminate against corporations authorized to do business in this state.

BUILDING AND LOAN ASSOCIATIONS—WHAT ARE—STATUTORY PROVISIONS. Where a foreign corporation is clearly a savings and loan association and has all the features of what is commonly known as a building and loan association, and its contracts are of the character of a savings and loan association, it is amenable to the "building and loan and savings and loan" act, 3 Rem. & Bal. Code, § 3601-1 *et seq.*

BUILDING AND LOAN ASSOCIATIONS—OFFENSES—"AGENTS"—CRIMINAL RESPONSIBILITY. Where a representative of a foreign corporation was confessedly acting as the "correspondent" of the company in this state, selling shares and taking contracts in his own name, receiving a commission therefor, and transferring them to the persons purchasing them, and authorized to do so by the company, he was the "agent" of the company, within the meaning of 3 Rem. & Bal. Code, § 3601-27, making it a misdemeanor for an "agent" of such a company to willfully violate any of the provisions of such act, prohibiting such companies from doing business in the state.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 20, 1914, upon a trial before the court, a jury being waived, and a conviction of a misdemeanor in violating the act relating to building and loan associations. Affirmed.

John W. Roberts and Philip Tworoger, for appellant.

John F. Murphy and H. B. Butler, for respondent.

MOUNT, J.—The appellant was charged with a misdemeanor under an information as follows:

"He, said Charles Merrill, in the county of King, state of Washington, on the 28th day of July, 1913, being then and there the agent and employee of The National Mercantile Company Limited, a corporation duly organized and existing under and by virtue of the laws of the Province of British Columbia, in the Dominion of Canada, did then and there wilfully and unlawfully violate and fail to comply with the provisions of an act of the legislature of the state of Washington, passed and approved February 14, 1913, and March 19, 1913, respectively, entitled 'An Act relating to the organization and to the management, regulation and control of building and loan and savings and loan associations and societies, etc.' In that he did then and there wilfully and unlawfully conduct a savings and loan association business, said business being in the form and of a character similar to that authorized by the foregoing act by then and there selling and knowingly causing to be sold and issued to one F. H. Lieben one certain contract and share of The National Mercantile Company Limited, said contract and share being more particularly described as No. L. P. Issue 1 Series 5, said The National Mercantile Company Limited, being then and there a foreign building and loan association not theretofore or at any time lawfully engaged in the state of Washington in the business of a savings and loan association."

After a demurrer to this information was overruled, the cause was tried to the court, a jury having been waived. The defendant was found guilty as charged and a fine of \$200 was adjudged against him. This appeal followed.

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It is admitted by the appellant that The National Mercantile Company Limited named in the information, is a corporation organized and existing under and by virtue of the laws of the province of British Columbia, in the Dominion of Canada; that its home office is at Vancouver, B. C.; and from that office it transacts all its business; that the company, as a part of its business, issues what is called a loan contract.

The contention on the part of the company is, so far as the state of Washington is concerned, that it sells its contracts through certain persons whom it calls correspondents; that Merrill was its correspondent in Seattle. The contention further is that on July 28, 1913, one Lieben went to Mr. Merrill, the appellant, and made application to purchase one of the company's loan contracts; that Merrill took his application and told Mr. Lieben that he had to send to Vancouver, B. C., for the contract; that it would be executed in Vancouver within a few days and sent over to Seattle. This contract was executed and forwarded to Merrill, and was delivered by Merrill to Lieben.

It was shown at the trial that The National Mercantile Company Limited is not authorized under the act referred to in the information to do a savings and loan business within the state of Washington. It has, however, filed articles of incorporation with the secretary of state under the general incorporation law. Its articles of incorporation, which are in the record, indicate that the company is authorized to do most any kind of business. So far as this record shows, it is engaged principally in the building and loan, or savings and loan business.

It is insisted by the appellant that the information is filed under § 22 of the act in question (Laws 1913, ch. 110, p. 343), which section is as follows:

"Any officer, director or agent of any savings and loan association or any other person who shall sell or issue or knowingly cause to be sold or issued to any resident of this state, any stock of said association while said association

does not have on deposit with the state auditor as required by this act, securities of the value and at the time herein prescribed, or while such association shall not have the certificate of the state auditor authorizing it to do business as herein prescribed shall be guilty of a gross misdemeanor." 3 Rem. & Bal. Code, § 3601-22.

Counsel for the state insist that the information was filed under the next succeeding section (§ 23), which provides:

"After the passage and approval of this act, it shall be unlawful for any person, association or persons or domestic associations not already organized and doing business under sections 3601 to 3638, both inclusive, of Remington & Ballinger's Annotated Codes and Statutes of Washington, to conduct a business in the form or of a character similar to that authorized by this act without first incorporating under this act. After the passage and approval of this act no foreign association not already lawfully engaged in the State of Washington in the business of a savings and loan association shall be permitted to conduct such a business in this state. . . ." 3 Rem. & Bal. Code, § 3601-23.

Section 27 (Id., § 3601-27) of the act provides that every agent or other employee who shall willfully violate any provision of the act shall be guilty of a misdemeanor.

In order to hold that the information was filed under § 22, and is governed by that section, it would be necessary to hold that "any stock of said association" means contract certificates which represent stock in the association, and does not mean capital stock of the association. We find it unnecessary to construe this section, or to hold that the information was filed under the provisions of this section; for it is clear that the information charges the defendant with conducting a savings and loan business by then and there selling and knowingly causing to be sold and issued to one F. H. Lieben one certain contract and share of The National Mercantile Company Limited. It was not the capital stock of the association that was sold in this instance, but a contract certificate share. In other words the defendant is charged here with conducting a savings and loan business when the company or business

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which he represents was not authorized to do business within this state. Clearly it seems to us that the information was filed and intended to be filed under the provisions of §§ 23 and 27 (Id., §§ 3601-23, 3601-27).

The principal contention of the appellant is that the act named in the information is unconstitutional and void for several reasons, as follows:

(1) That the act delegates both judicial and legislative power to the state auditor.

(2) That it is in violation of § 8, art. 1, of the constitution of the United States and of the 14th amendment, in that it imposes a burden upon interstate commerce.

(3) That it is in violation of the 14th amendment to the constitution of the United States because it abridges the privileges and immunities of citizens of the United States; and because it deprives investment companies or citizens of property without due process of law, and deprives them or other persons similarly situated of the equal protection of the law, and denies that freedom of contract guaranteed by the constitution; and is class legislation.

(4) That it is in violation of art. 2, § 19, of the constitution of this state.

We shall notice these contentions briefly.

The constitution of this state at § 20, art. 3, provides:

“The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. . . .”

The appellant argues that no other duties can be imposed upon the state auditor under this constitutional provision than the duties to audit public accounts, and such other duties in connection therewith as may be prescribed by law. For the purpose of this case, we shall concede that this is the plain meaning of the constitutional provision quoted. Counsel for the appellant then set out the different sections of the act under consideration, and argue that the provisions of the act are contrary to the constitutional provision above quoted

for the reason that it makes a judicial and executive officer of the auditor, and that his decisions are final. Many pages of the appellant's brief are taken up with this discussion. We think it is sufficient to say that these building and loan or savings and loan associations, as provided for in this act, are within the control of the legislature of the state. They are, in their nature, public associations doing business with the public, as banks, insurance companies and other trust companies, and are subject to regulation on the same theory that these other trust companies are subject to lawful regulation. *State Savings & C. Bank v. Anderson*, 165 Cal. 487, 132 Pac. 755.

The accounts of these savings and loan associations are, therefore, in their nature public. We think it is not overstating the constitution to say that the legislature has the power under this provision to authorize the state auditor to examine and audit accounts of such trust companies, and in connection therewith to perform such duties as are necessary to a full and fair control of the business of such associations. It is true that some of the duties placed upon the auditor by the provisions of this act may be said to be in their nature executive, and possibly judicial; but they are only such as are accorded to every other officer having control of that class of business. The auditor is authorized, under the terms of the act, to examine into the accounts of such corporations to determine the financial standing of the stockholders, and to determine the responsibility of the incorporators, and the character and general fitness thereof. These requirements necessitate the exercise of discretion and judgment, but are not necessarily judicial or executive as these terms are used in the constitution. They are ministerial in their character. When an account is presented to the auditor to be allowed or rejected, he must base his final determination upon his judgment. This is, in a sense, judicial. When he issues a warrant in payment of an account which he has approved, this is in a sense an executive act. But these acts are acts in con-

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nection with his duties as auditor and are ministerial acts. The same is true of the examination and the control of these savings and loan associations. The legislature we think undoubtedly had the right to impose such duties in connection with the duties of auditor as were necessary to determine the financial standing and character of the business and of the persons connected therewith as would insure the people of the state a solvent going concern. Notwithstanding the many authorities and technical reasoning presented by the appellant in his brief, we are satisfied that the legislature was authorized to make the state auditor a general supervising officer over this class of corporations, and that the act is not void on that account.

It is next argued that the act is an unlawful interference with and a burden upon interstate and foreign commerce. Counsel argue, under this head, that it is without the power of the state to prevent outside companies or corporations from selling its contracts within this state. If these contracts were interstate and foreign commerce, there would be force in this contention. But it is plain we think that a contract of the nature of a savings and loan contract is neither interstate nor foreign commerce. In the case of *Paul v. Virginia*, 8 Wall. 168, the supreme court of the United States said:

“Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in

Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In *Hooper v. California*, 155 U. S. 648, the same court said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature.

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse. . . ."

In *Nathan v. Louisiana*, 8 How. 73, it was held that a broker dealing in foreign bills of exchange was not engaged in commerce; that a state tax on money or exchange brokers was not void as a regulation of commerce. The same is true of these contracts. The National Mercantile Company Limited mentioned in the information, issued a contract in the usual form of building and loan or savings and loan contracts. The contract provided that, upon a certain number of monthly payments a certain loan would be made in its order upon the contract. That, after a certain number of payments, the contract would be matured, or the loan would be paid. It is the usual form of savings and loan contracts; and is like a policy of insurance which is to be paid upon the happening of a particular event and depends altogether upon the performance of the contract and of the responsibility of the parties. It is in no sense interstate commerce.

It is next argued that the act is in violation of the due process of law, denial of equal protection, and unlawful dis-

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crimination clauses of the constitution of the United States and of the state. There is clearly no merit in this contention. The National Mercantile Company Limited is not a citizen of this state. It has not been authorized by the state to do the class of business that the accused was attempting to do in this state. There can be no doubt that a corporation is a creature of the laws of the state where it is created, and has no legal existence beyond the limits of such state, except such as are granted to such corporations by the laws of the states in which such corporations apply for permission to carry on their business. As was said in *Pembina Consol. Silver Min. & Milling Co. v. Pennsylvania*, 125 U. S. 181:

"It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one state cannot, with some exceptions, to which we shall presently refer, do business in another state without the latter's consent, express or implied. In *Paul v. Virginia*, 8 Wall. 168, this court, speaking of a foreign corporation, (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded,) said: "The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion. . . ."

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire officers there, arises where the corporation is in the employ of

the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority."

Authorities might be duplicated indefinitely upon this question, but there is no necessity therefor. The existence of this company within the state was upon condition that it should not do a savings and loan association business, because that business was prohibited to foreign corporations. At the time it filed its articles with the secretary of state, it did not attempt to comply with the savings and loan association act, because it was prohibited from so doing by that act. As a citizen of this state, the appellant and the company which he represented were entitled to the privileges and immunities of citizens under like conditions and no more.

It is next argued that the law is void as class legislation, because it undertakes to make it a crime for any person within the state to sell stock of building and loan associations while the stock of other kinds of associations may be sold. The act clearly does not make it a crime to sell the stock of building and loan associations which are organized under the laws of this state, or which properly do business within the state. It simply says that where a corporation is not authorized to do business within this state, its contracts and its stock shall not be sold within the state. The act is not discriminatory. There is no merit in this contention.

It is next argued that The National Mercantile Company Limited is not a building and loan association. It is possible that it is not a building association, but it is clearly a savings and loan association, and has all the features of what is commonly known as a building and loan association. The contracts offered in evidence make this clear. This is not a question of law. It is one entirely of fact. The contract issued by the appellant in this case is of a savings and loan character. It is needless to set out the record showing that fact.

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It is lastly argued that there is no proof of the crime. The concessions of the appellant as stated heretofore in this opinion, show that he was acting, not as an agent as he says, but as a local correspondent of The National Mercantile Company Limited. He was confessedly selling their shares, taking the contract in his own name, receiving a commission therefor, and then transferring them to the person purchasing. In short, he was authorized by the company to do and was doing by indirection what he was prohibited from doing directly. He was clearly an agent of the company. The company held him out as an agent in their advertising matter. And there can be no doubt under these facts that he was a recognized acting agent, and is liable under the statute.

We find no merit in any of the contentions of the appellant, and the judgment is therefore affirmed.

Crow, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 11595. Department One. December 22, 1914.]

JOE MANDEL, *Appellant*, v. WASHINGTON WATER POWER COMPANY, *Respondent*.¹

CARRIERS—INJURIES TO PASSENGERS—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. There is no evidence to sustain a verdict for personal injuries sustained by a passenger in a street car, where two men each with his elbow upon the window sill of the car in which he was riding, had their arms broken while the cars were passing each other on a double track line, and the windows were guarded by iron bars, and when the cars were backed up, it was found that there was a clearance between them of thirteen inches, and undisputed physical facts showed that there could have been no collision of the cars; since oral evidence must give way to physical facts, and the passengers could only have met with such an accident by permitting their arms to extend through the bars and come in contact.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 17, 1912, dismissing

¹Reported in 144 Pac. 921.

an action for injuries sustained by a passenger on a street car, upon withdrawing the case from the jury. Affirmed.

Ernest E. Sargeant, for appellant.

Post, Avery & Higgins, for respondent.

Crow, C. J.—Action by Joe Mandel against the Washington Water Power Company, a corporation, to recover damages for personal injuries. From a judgment in defendant's favor, the plaintiff has appealed.

Appellant contends that the trial court erred in sustaining a challenge to the evidence, in withdrawing the case from the jury, in rendering judgment for the respondent, and in refusing a new trial.

The undisputed evidence shows that respondent owns and operates an electric street car system, in the city of Spokane; that one of its lines extends to the town of Hillyard; that, on the day of the accident, appellant, as a passenger, boarded one of respondent's cars at Howard street and Riverside avenue, in the city of Spokane, for the purpose of going to Hillyard; that he took a seat next to an open window on the left hand side of the car; that, in the course of the trip, and while traveling on Illinois avenue, where respondent maintains a double track, appellant was injured, just as an inbound car traveling in an opposite direction on the adjoining track passed the car upon which appellant was a passenger; that his injuries consisted of the breaking of certain bones in his left hand and wrist, accompanied by severe cuts which caused excessive bleeding; that the side of the car upon which appellant sat was towards the opposite track on which the inbound car was passing; that, at the time appellant was injured, one Johnson, a passenger on the inbound car, who sat near an open window toward appellant's car, was also injured by having his left arm broken; and that appellant and Johnson were injured just as the cars were passing each other. The evidence further shows that iron bars had been installed on

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each car outside of and across its windows for the protection of passengers.

Appellant, in substance, contends that the tracks were not in good repair; that they were too close together; that the cars swayed to a considerable extent in passing; that respondent's servants operated the cars so negligently that they collided; and that by reason of such negligence and collision, appellant was injured. Respondent denies that any collision occurred, or that there was any competent evidence of a collision. Its theory is that appellant's hand and arm extended out of the open window beyond the iron bars; that Johnson's hand and arm were in a similar position on the other car, and that, as the cars passed, the arms of the two men came into violent contact causing their respective injuries. There was no evidence of a collision of the cars other than the statements of a few witnesses who were passengers, and who testified to a jolt or crash which caused them to believe a collision occurred. Neither car was injured or damaged in any way, except that glass in a window of the inbound car immediately back of where Mr. Johnson sat was broken. Each car continued its journey until stopped upon signal. After stopping, each car was backed to the point of passing, where it was observed that thirteen inches of space intervened between the iron window bars of one car, and those of the other. Neither car was damaged in any way, except by the breaking of one pane of glass, as above stated. No marks or indications of injury or collision appeared upon either car, and each car continued its respective journey.

Appellant testified that he did not permit his arm or hand to project beyond the bars of the open window. Johnson was not produced as a witness, but passengers on the inbound car testified that his arm was resting on the sill of an open window. Notwithstanding the testimony of those witnesses who expressed a belief that a collision had occurred, undisputed physical facts are convincing to the effect that no collision did occur, showing that they were mistaken. This

being true, it is impossible to understand how the two men could have been injured at the same moment, as they were, unless the arm and hand of each extended through or over the iron bars to such an extent as to cause them to come in violent contact as respondent contends. The evidence shows that the usual and proper distance was maintained between the cars, affording a clearance of at least thirteen inches between the iron window bars of the respective cars. If appellant and Mr. Johnson each permitted his left hand or arm to extend a distance of only seven inches beyond the bars, that distance would have been sufficient to permit them to come in contact and cause the injuries. Had a collision of the cars actually occurred, and had appellant been injured thereby, negligence on the part of respondent would have been presumed, and the doctrine of *res ipsa loquitur* would have applied, making it the duty of respondent to show the cause of the collision, and that respondent was free from negligence, but it is impossible to read the entire record and conclude or find that a collision actually occurred. Undisputed physical facts are conclusive to the contrary. It follows, therefore, that the question of whether a collision actually occurred was not an issue for the jury, as contended by appellant. The record discloses no evidence showing, or tending to show, any negligence upon respondent's part which contributed to, or caused, appellant's injury. Physical facts, which are undisputed and speak the truth with unerring certainty, must control in this case. In *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51, this court said: "Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable."

The trial judge committed no error in sustaining respondent's challenge to the sufficiency of the evidence.

The judgment is affirmed.

MAIN, GOSE, ELLIS, and CHADWICK, JJ., concur.

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[No. 11807. Department One. December 28, 1914.]

THE STATE OF WASHINGTON, *on the Relation of W. L. Gwinn
et al., Appellants*, v. R. E. BUCKLIN *et al.*,
Respondents.¹

CORPORATIONS—BY-LAWS—FORCE AND EFFECT. A by-law of a title and abstract corporation providing that each stockholder shall have the right to inspect the books and records of the company at any time during business hours, has all the force and effect of a statute to the same effect.

CORPORATIONS — STOCKHOLDERS — RIGHTS—INSPECTION OF BOOKS—MOTIVES. The right of inspection of corporate books, given to stockholders of a title and abstract corporation, cannot be withheld by the corporation on the ground that the only purpose of such inspection was to secure a knowledge of the company's customers and prices, which such stockholders desired to use in aid of a rival abstract company belonging to such stockholders, and to the injury of the business of the corporation.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered October 23, 1913, dismissing mandamus proceedings, after a hearing before the court. Reversed.

J. H. Allen, for appellants.

PARKER, J.—The relators, W. L. Gwinn and R. L. Thomas, stockholders of the Kitsap Title Abstract Company, seek, by mandamus proceedings, to compel the respondents, R. E. Bucklin and E. A. Landolt, the president and secretary respectively of that company, to permit the relators to examine the books and records of the company. Upon a hearing had in the superior court, judgment was rendered denying the relief prayed for and dismissing the action. From this ruling and judgment, relators have appealed to this court.

The Kitsap Title Abstract Company is a corporation organized and existing under the laws of this state, having its

¹Reported in 145 Pac. 58.

capital stock divided into one thousand shares. Relators own 497 shares; respondents own 502 shares, and a third person owns one share of the stock of the company. Respondents are president and secretary respectively of the company. They have the custody of its books and records and the active management of its business. They are willing to accord to relators the privilege of examining the books and records of the company except such books and records as show the list of the customers of the company and the particular prices paid by them for abstracts. Respondents insist that these particular books and records of the company constitute a portion of the good will and trade of the company, and are such trade secrets that, if made known to relators, who are proprietors of a rival abstract company in competition with the Kitsap Title Abstract Company, such knowledge by relators will result to the material injury of the business of the Kitsap Title Abstract Company. In this connection, respondents allege:

“That the only purpose of said W. L. Gwinn in seeking the examination of the books of said company has been to obtain the list of customers of said company, together with the prices quoted to the same for the making of abstracts, so that he may solicit such customers for patronage for the rival company operated by himself and to quote prices below the cost of making such abstracts so as to deprive the Kitsap Title Abstract Company from the patronage of such customers; likewise, the said Gwinn would make use of said information for the purpose of discrediting the work of said Kitsap Title Abstract Company, in so far as it would be possible for him so to do and particularly discredit the management and control of said business by the respondents Bucklin and Landolt.”

We assume, for argument's sake, that this allegation and the facts above stated are true, in so far as such facts may be relevant and controlling in this controversy. This constitutes as favorable a statement as can be made from the record in respondents' behalf.

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Counsel for appellants contend that they have the absolute right to examine the books and records of the company without such right being impaired in the least by respondents' claim of right to inquire into relators' motive and purpose in making such examination.

We are not here concerned with the mere common law right of stockholders to examine the books and records of the corporation in which they hold stock, which right is not absolute but subject to restrictions governed largely by the circumstances of each particular controversy. The nature and extent of such common law right was reviewed by this court in *State ex rel. Weinberg v. Pacific Brewing Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. We have no statute in this state bearing upon this subject, but the Kitsap Title Abstract Company has a by-law reading as follows:

"Each stockholder shall have the right to inspect the books and records of the company at any time during regular business hours of said company."

This by-law, we think, has all the force and effect of a statute containing such a provision. *Cummings v. Webster*, 43 Me. 192; *Wyoming Coal Mining Co. v. State ex rel. Kennedy*, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. 1014; 10 Cyc. 351.

In *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. 156, the court had under consideration the claimed right of a stockholder to examine the books and records of a corporation in which he held stock, under a statute of California providing that such records shall "be open to the inspection of any director, member, stockholder," etc. The secretary of the corporation, in resisting the stockholders' claim of right of examination, alleged affirmatively:

"That the object and purpose of the plaintiff is to injure the corporation of which defendant is secretary, and to gain information for the private use of plaintiff, in connection with two other corporations, of which plaintiff is a stock-

holder, engaged in a similar business to that of the corporation represented by defendant."

It was conceded that appellants desired to see the list of the corporation's customers and their contracts. In sustaining the striking out of this defense by the trial court, the supreme court said:

"At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation. (2 Cook on Corporations, sec. 513; *Stone v. Kellogg*, 165 Ill. 204). But the writ would not issue as a matter of course to enforce a mere naked right, or to gratify mere idle curiosity, but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or show some beneficial purpose for which the examination was desired. (High on Extraordinary Legal Remedies, 3d ed., sec. 310.) But the great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the constitution and the statute cannot be defeated by stopping to inquire into motives. If this were so, the stockholder would be driven from the certain definite right given him by the statute to the realm of uncertainty and speculation. The small stockholder—whose rights are as sacred in the eyes of the law as those of the rich owner of the majority of the stock—would be refused the right of inspection given him by the statute, and when he comes into court setting forth his rights, and the fact that he is a stockholder, and has been refused permission to inspect the books, he is met by an answer of the corporation setting forth that he is not seeking the information nor the inspection for any legitimate purpose, and that his motives are improper. In the trial of this affirmative defense witnesses are required and expenses incurred. If the court should find in favor of the corporation, and deny the petitioner's right, he is driven to an appeal. In the appellate court he is met by the rule that a finding of fact based upon conflicting testimony cannot be disturbed. Thus the certain, adequate, and sum-

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mary remedy for the right given by statute is driven into the realm of uncertainty, expense, and delay. Such was not the intent of the framers of the constitution, nor of the legislature in enacting the statute. The statute is founded upon the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper."

This doctrine is adhered to in *Kimball v. Dern*, 39 Utah 181, 116 Pac. 28, Ann. Cas. 1913 E. 166, 35 L. R. A. (N. S.) 134, where the subject is treated at considerable length and many authorities reviewed. Among the decisions which seem to regard the statutory rule as being not quite so unqualified as indicated in the California and Wyoming decisions above noticed, we note that of *Foster v. White*, 86 Ala. 467, 6 South. 88, where, referring to the statute of that state giving the right of inspection, it is said:

"The only express limitation is, that the right shall be exercised at *reasonable and proper times*; the implied limitation is, that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said, this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects to the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the

capital, to which they have contributed, is employed and managed."

This language seems somewhat inharmonious within itself. It would seem that, if the custodian of the corporate records cannot question or inquire into the motives or purposes of the stockholder in requesting the examination, that the custodian's right to withhold the privilege of examination is entirely at an end except as to reasonableness of time, yet the court seems to conclude that there may be motives and purposes on the part of the stockholder which would warrant the custodian in withholding the privilege of examination aside from the question of reasonableness of time. We find similar observations by the Maryland court in *Weihenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446-457, where the right of examination was claimed under a statute reading:

"The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members."

The court said:

"The right thus given to the stockholder is unconditional and unqualified. . . . It is stated in the answer to the petition that Weihenmayer is engaged in the manufacture and sale of hosiery and knit goods, and is a rival and competitor of the Windsor Knitting Mills in business, and that he desired an examination of the books, documents, and records of the corporation for the purpose of obtaining information to be used by him in the conduct of his own business, to the injury and loss of the said corporation. . . . But the petitioner's right would not be forfeited by any such cause. The right is given to him as a stockholder by statute, and is absolute, and not made to depend upon any circumstance but the ownership of the stock. It is easy to see that there might be good reasons for refusing an application; for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied."

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Whatever the view of the court in this last quoted language is as to reasons and motives on the part of the stockholder warranting the custodian refusing inspection of the records, it is apparent that the fact that such stockholder is interested in a rival concern which is in competition with the corporation and might by the examination of the books of the corporation acquire and use knowledge in aid of the other concern to the detriment of the corporation by way of competition, his right to the inspection of the books would not thereby be affected in the least. It is possible that the Alabama and Maryland courts had in mind a possible inspection of the books and records of the corporation by a stockholder with a view of disclosing some secret process of manufacturing an article, possessed and used by the corporation, or where the motives and purpose of the stockholder would be to get temporary possession of a record for the purpose of mutilation or theft of the record or some other equally unlawful purpose. If the qualifying language of those courts means no more than this, we would be inclined to agree with them; but there is no such unlawful purpose of relators here alleged or shown. We are of the opinion that the inspection of the books and records here sought by relators cannot be withheld from them on the ground that they would thereby acquire knowledge which would be used by them in aid of the business of their other abstract company, to the detriment of the Kitsap Title Abstract Company.

The judgment is reversed, with instructions to the trial court to enter its judgment compelling respondents to permit relators to examine the books and records of the company, including its books and records showing the list of its customers and prices paid by them for abstracts.

CROW, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 12021. Department One. December 28, 1914.]

F. W. MAXWELL *et al.*, *Respondents*, v. A. R. DIMOND *et al.*,
Appellants.¹

APPEAL—REVIEW—HARMLESS ERROR. It is harmless error to refuse to require plaintiffs, in an action for conversion, to elect whether they predicated their ownership on a sale, or upon ratification and estoppel, where the trial proceeded upon the latter theory, and no claim of surprise or motion for continuance was made, but the defendants offered evidence to rebut the plaintiffs' theory.

LANDLORD AND TENANT—CROPPING LEASE—CONDITIONS—UNAUTHORIZED TRANSFER—RATIFICATION—ESTOPPEL—EVIDENCE—SUFFICIENCY. Lessors who had made a cropping lease for winter wheat providing that the title to the crop should remain in them until receipt of their share, and that the lessees should not assign the lease without their consent or dispose of any part of the crop to the lessors' prejudice, will be held to have ratified a public sale of their interests, made by the lessees in February, and are estopped to dispute the title of the purchasers at the sale, where there was evidence to the effect that the purchasers worked on the crop in March, April and May in full view of the lessors, living near by and working on adjoining land and that the lessors, shortly after the sale when the prospects for a crop were poor, were notified of the sale and made no objection or claim until May 20th, after the prospects for a large crop were assured.

SAME—OWNERSHIP OF CROP—ESTOPPEL—EVIDENCE—ADMISSIBILITY. In an action for the conversion of wheat, purchased by plaintiffs from a cropping tenant regardless of restrictive clauses in the lease, evidence of plaintiffs' continued cultivation of the crop is admissible on the question of their good faith, and also on an issue of the estoppel of the defendant lessors after knowledge of such cultivation.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered November 1, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for conversion. Affirmed.

Daniel T. Cross and *W. E. Southard*, for appellants.

Boyd P. Doty and *C. G. Jeffers*, for respondents.

¹Reported in 145 Pac. 77.

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Opinion Per GOSE, J.

GOSE, J.—This is an action for damages growing out of the alleged conversion of a crop of wheat. Verdict and judgment for plaintiffs. The defendants have appealed.

The facts are these: On the 28th day of February, 1911, the appellants entered into a written contract with one Meyers by which they leased to him certain land in Grant county. A portion of the land was leased for one year and the remainder for two years. The lease was duly filed for record in March following. The lease provides that the lessee shall not assign the lease or sublet the leased premises without the written consent of the lessors. It further provides that the title to all the products of the land shall be and remain in the lessors until they have received their rent, viz., one-third of the crop at the machine in sacks furnished by them, and that the lessee shall not dispose of any part of the crop to the prejudice of the lessors. The lessee fallowed one hundred and fifty acres of the leased land which fell within the two-year clause, in 1911, sowed it to wheat in September, and on the 24th day of February, 1912, caused his interest in the growing crop to be sold at public sale to the respondents, who paid at the rate of \$2.95 per acre. The attempted sale was made without the knowledge or consent of the lessors.

The appeal presents three principal questions: (1) a question of pleading and practice; (2) the effect of the sale of a growing crop under the provisions of the lease; and (3) the sufficiency of the evidence to support the verdict.

At the close of the respondents' opening statement to the jury, the appellants' counsel moved the court to require the respondents to elect whether they would predicate title upon the purchase at public sale or whether they would rely upon title by estoppel. This motion was denied. The case was tried by the respondents upon the theory of ratification and estoppel. It is now contended that the complaint is insufficient in that it does not plead a title acquired in either of these ways. It is alleged in the complaint that respondents

were the owners and entitled to immediate possession and control of the wheat, describing the land upon which it grew, the quantity threshed, and value per bushel, and alleging further that, at a time stated, the appellants, then being in possession of the wheat, converted and disposed of it to their own use and benefit, to respondents' damage in the sum stated. In short, the complaint is in the usual form of a complaint in an action of conversion. It is earnestly contended that the respondents should have alleged the ultimate facts upon which they relied as constituting ratification and estoppel. This question we need not decide. The appellants were apprised of the course the case would take, at the commencement of the trial. They made no claim of surprise or unreadiness to meet the issues, and after the respondents had rested their case, they offered evidence tending to rebut the theory of ratification and estoppel. The statute requires us to disregard all errors which do not affect the substantial rights of the complaining party. Rem. & Bal. Code, § 307 (P. C. 81 § 303); *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673. Inasmuch as there was no claim of surprise and no application for a continuance and the case was tried upon the merits, the error, if any, is without prejudice.

It is next contended that, under the terms of the lease, the lessee had no authority to sell the crop without the consent of the appellants, which it is conceded was not given at the time of the sale. Inasmuch as the court so instructed the jury, this question need not be further considered.

The chief contention upon the merits is that the evidence does not support the verdict. It is admitted that, shortly after the pretended sale of the growing crop, Meyers left the leased premises and did not return. The appellants claim that they re-entered and re-possessioned themselves of the premises on the 23d day of April, 1912. They harvested the crop in July following. Upon the other side of the case, the respondent Maxwell testified that the respondents bought Meyers' interest in the growing crop upon one hundred and fifty

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acres of the leased premises, on the 24th day of February, 1912; that they paid \$2.95 per acre and gave a note for the purchase price; that they harrowed all of the wheat the latter part of March; that the respondents again went upon the land about the 20th day of April; that the respondent Maxwell then told the appellants that they "had bought Charley Meyers' wheat, and they said, Yes;" that "we talked about the crop and I asked them [the appellants] if they thought that winter wheat up there would make anything, and that Abe [meaning the appellant A. R. Dimond] says, 'Well, it didn't look like there is anything there; pretty thin.' So we went on up and left there [meaning the barn where the conversation occurred] and went up on the wheat and put out the poisoned wheat." He further testified that he told the appellants that he had harrowed the wheat. He further testified that the respondents were next there about May 20; that they harrowed between fifty and sixty acres of the wheat at that time; that the harrows pulled out some of the wheat, so that they concluded that it would be best to discontinue the harrowing at that time; that he then had a conversation with Hugh Dimond in which he (Maxwell) told Dimond that he believed he would quit harrowing because the harrows were pulling out the wheat, and that Dimond said, "If it has got a good mulch on it, it does not need any harrowing any more." So I told him it had, and so we quit harrowing and went home." The witness said that respondents were next there about the 23d day of May; that they put squirrel poison over the entire tract and pulled some weeds and fixed a little fence; that the appellants then called them down to their house, which was near by, and for the first time asserted ownership to all the wheat, and said to them that they intended to hold it. This information was given by the appellants, the respondents say, immediately after a heavy rain. The wheat was then heading and, according to the testimony of one of the respondents, its condition was such that it was

"bound to be a bumper crop." At this stage of the case the court, upon motion of the appellants' counsel, struck the evidence as to the harrowing done in March. After this testimony was stricken, the appellants' counsel, upon the cross-examination of a witness, developed the fact that the respondents had harrowed the entire crop during the month of March. This fact was shown later by the testimony of one of the respondents which was not stricken. One of the respondents testified that, at the time they harrowed the fifty or sixty acres of wheat, and at the time they put out the squirrel poison, the appellants were upon the adjoining tract, and that "I could not say that they saw me, no. They could not very well help it." At the time this harrowing was done the appellants were living in a house about a quarter of a mile distant from the land upon which the respondents were working, and were working upon adjoining land. The topography of the country was such that we think the jury was warranted in drawing the inference that the appellants did see the respondents at the time they were harrowing, putting out poison, pulling weeds, and fixing the fence.

At the close of the respondents' testimony, the appellants' challenge to the sufficiency of the evidence was denied. The appellant A. R. Dimond testified that the auctioneer told him the latter part of March that he had sold the wheat; that he told him "I guessed he was mistaken . . . that there was a lease; that the lease said that it could not be assigned nor disposed of without written consent." The appellants in the main denied the conversations to which the respondents testified.

Upon these facts, we think the court was warranted in denying the appellants' challenge and submitting the case to the jury. *Rowe v. James*, 71 Wash. 267, 128 Pac. 539; *Carruthers v. Whitney*, 56 Wash. 327, 105 Pac. 831, 134 Am. St. 1114.

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In *Rowe v. James*, we said :

"The basis of all estoppel *in pais* is that there is one innocent party and one negligent or wrongdoing party, and the doctrine means that, when the innocent party has been induced to surrender a valuable right or to change his position to his prejudice relying upon the acts or representations of the negligent or wrongdoing party, then the latter will not be heard to assert the falsity of his acts or representations to the prejudice of the former."

In *Carruthers v. Whitney*, Judge Dunbar, speaking for the court, said :

"The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage."

The testimony as to the harrowing done in March was admissible upon two grounds, (a) to show that the respondents were acting in good faith, and (b) because of the testimony of the respondent Maxwell to the effect that he told the appellants in the first conversation he had with them that he had harrowed the wheat. The jury evidently believed this testimony. When silence becomes a fraud, it will operate as an estoppel. When the appellants found that the respondents had bought Meyers' interest in the crop and had harrowed the wheat and were intending to again harrow it and do whatever was necessary to contribute to its proper growth and maturity, it became their bounden duty to speak, and their silence, in the face of the facts stated, was of such a character as to warrant the jury in inferring ratification or estoppel. It was upon this theory that the court submitted the case to the jury. He instructed the jury that, under the terms of the lease, Meyers had no right to sell his interest in the growing crop; that if he did sell it and left the leased land without any intention of returning, the attempted sale and departure from the land operated as an abandonment

of the lease; that the respondents acquired no rights from the mere fact of purchase "unless the attempted sale was subsequently ratified or acquiesced in by the Dimonds or unless their subsequent words, acts, or conduct were such as to legally estop them from now claiming that they did not ratify or acquiesce in such attempted sale." The court further instructed the jury that, if they should find from the evidence that the respondents bought Meyers' interest in the growing crop and paid a valuable consideration therefor and thereafter claimed it as their own, and these facts came to the knowledge of the appellants, and they by their conversation or conduct led the respondents to believe that they consented to the sale or ratified it, and that relying on such belief, the respondents thereafter expended work and labor upon the crop, their verdict should be for the respondents, for the sum which the parties had stipulated was the net value of the wheat.

No error is assigned to the instructions, and we think the evidence warranted the verdict. The judgment is affirmed.

CROW, C. J., MORRIS, PARKER, and CHADWICK, JJ., concur.

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[No. 12029. Department One. December 28, 1914.]

JOHN KONRAD BECKER, *Appellant*, v. ROBERT WM. CLARK
et al., *Respondents*.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUDULENT REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A sale of land may be rescinded by the vendee for fraud, where the land was 1,700 miles away and had never been seen by the vendee, and there was clear and convincing evidence that the representations of the vendor's agent which induced the sale were to the effect that the land was in the heart of a German Catholic settlement, and were made knowing that to be a material fact in the mind of the vendee, who was of that faith and bought in order to have a home in such a community, when, in fact, the whole country was an unsettled wilderness; and it is immaterial that the vendee did not intend to go there for a year or two.

SAME. In such a case, the breach of promissory representations that a church would be built there the following year is immaterial except as it threw light on the other representations, and so does not remit the purchaser to an action for damages.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 10, 1914, dismissing an action for rescission, after a trial on the merits to the court. Reversed.

V. T. Tustin, for appellant.

John M. Gleeson, for respondents.

GOSE, J.—This is an action in equity to rescind a contract for the purchase of a section of land near Babine Lake, in the province of British Columbia, and to recover a judgment for \$1,600, the amount paid upon the contract, with legal interest from the date of its payment. There was a judgment dismissing the action. The plaintiff appealed.

The appellant, a German farmer of the Catholic faith, sixty-seven years of age, residing at Colton in Whitman county, this state, in the month of April, 1913, entered into

¹Reported in 145 Pac. 65.

a contract with the respondent Clark and the respondent corporation, for the purchase of the land in question. The contract price was \$6,400. Sixteen hundred dollars was paid when the contract was signed. The negotiations were all carried on and the money was paid at Colton. The land is seventeen hundred miles distant from Colton. The appellant had never seen the land, and had no information of either its quality or desirability except such as he acquired from one Hopkins, the selling agent of the respondents. This fact was known to Hopkins. The appellant and two of his witnesses, Ernest Becker and John Reisenauer, farmers living in the vicinity of Colton, the former a brother of the appellant, testified that Hopkins represented that the land was the center of a German Catholic settlement, and that a Catholic church would be erected on the adjoining section during the summer of 1913. The appellant testified that it was upon these representations he contracted, and that without them he would not have contracted at all. He further said that it was his purpose to take two or three German families with him and move upon the land within a year or two and make it his home. There were no settlers other than Indians within five miles of the land. The whole country was a forest primeval. There were two Indian Catholic churches, each about twelve miles from the land, and Indian villages at these points.

The agent, Hopkins, testified in respect to his representations about the German Catholic settlement, as follows:

"Q. Then about the Catholic settlement, you knew that Mr. Becker was interested in having a Catholic settlement there in case he bought? A. He told me that he would be. Q. You knew at that time that the prime reason for his buying there was that there was a Catholic settlement there and he would move into it and there would be a church built the coming year? A. No, sir. Q. Didn't he tell you that? A. He didn't tell me that would be his main object because he had no authority to tell me that would be. Q. He had no authority? A. No, because I hadn't told him there was a Catholic settlement. . . . I told him if he bought there, which he

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might do, that we could probably interest a great many other Germans there who were Catholics and would sell to them and they could all live there together if they wanted to."

In respect to the building of the church he testified:

"The facts are I did not tell him there would be a church built there on section 18 or any place else right in there, not naming any particular point. Q. Did you name any particular time? A. No, no particular time, but that if he bought there, *he being a Catholic*, that other Catholics would probably buy there and I could see no good reason why they couldn't have a church there at any time they wanted it."

It is important to note that the respondents' agent sought the appellant at the latter's home in Colton, and induced him to make a contract for the purchase of land seventeen hundred miles distant, which the agent knew the appellant had not seen. The agent knew that the appellant was a German Catholic and that he wanted land in a German Catholic settlement. To the appellant, the presence of a German Catholic settlement around the property was a material fact, and the representation that it existed was an inducing cause for the purchase. Aside from the questions of race sentiment and religious belief, it is a well known fact that the character of the neighbors materially affects the market value of property. The trial court said that there was a preponderance of evidence to the effect that Hopkins represented that the land was in the heart of a German Catholic settlement, but that the evidence upon the point was not clear and convincing. The controlling factor with the court apparently was that, inasmuch as the appellant had no immediate intention of going upon the land, the nationality and religious belief of the neighbors was immaterial. In this we think he was in error. Whether the appellant purchased the land on speculation or for the purpose of making it his home, the character of the neighbors would materially affect the market value of the land. A purchaser of property takes into consideration its probable future value. He knows that, in event he desires to

sell it, the question of neighbors, whether good or bad, will enter into the transaction. Indeed, he knows that this element may make or defeat a sale. The appellant swore, however, that he purchased the land for a home and that the inducing cause was the representation that the neighborhood was settled by people of his nationality and religious belief.

The law in this state is that,

"The purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations is not readily ascertainable." *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 192 Am. St. 1102; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Chapman v. Hill*, 77 Wash. 475, 137 Pac. 1041; *Lamb v. Levy*, 77 Wash. 511, 137 Pac. 1024.

Beginning as early as *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799, this court has steadfastly adhered to the view that a lie is not legal tender in this state. *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879.

We think the evidence is clear and convincing that the respondents' agent represented to the appellant that the land contracted for was in the heart of a German Catholic settlement, knowing that to be a material fact in the mind of the appellant, and the inducing cause of the purchase, when in fact the whole country was an unsettled wilderness. The mere fact that the appellant did not intend to go upon the land for a year or two does not militate against his right to rescind the contract. To him, the representation was material, and without the representation, he testified that he would not have considered the contract at all.

We have treated the promissory representation that a church would be built the following summer upon an adjoining

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section as immaterial except as it throws light upon the other representations. As a general rule the breach of a promissory representation does not warrant a rescission, but the purchaser is remitted to an action for damages.

The judgment is reversed, with directions to enter a judgment in favor of the appellant and against the respondent Clark and the respondent corporation as prayed for in the bill.

Crow, C. J., CHADWICK, PARKER, and MORRIS, JJ., concur.

[No. 12045. Department Two. December 28, 1914.]

JAMES DONOFRIO *et al.*, *Respondents*, v. WATSON BROTHERS,
Appellants.¹

TROVER AND CONVERSION—TITLE OF OWNER—CHATTEL MORTGAGEES. Chattel mortgagees, placed in possession under an agreement with the mortgagors transferring the title to them, are the owners, and may sue in their own names for a conversion of the chattels.

SAME—VALUE—EVIDENCE—ADMISSIBILITY. In an action for the conversion of a span or horses, evidence of their value at the time they were placed in the hands of the defendants is competent, where there is also evidence that they were of that value at the time of the demand for their return.

SAME—WHAT CONSTITUTES. Refusal of a demand for the return of horses intrusted to defendants for use for their keep, for the reason that the horses had been sold, constitutes a conversion.

SAME—RIGHT OF ACTION—OWNERSHIP—RIGHT OF POSSESSION. Chattel mortgagees, to whom the ownership and right of possession had been transferred by the mortgagors, can maintain an action for conversion, without ever having been in possession.

ANIMALS—AGISTER'S LIEN—PERSONS ENTITLED. No agister's lien on a span of horses can be claimed by one who obtained possession under a special contract to keep the horses for their use without cost, and redeliver the horses at any time upon demand.

Appeal from the judgment of the superior court for King county, Humphries, J., entered December 15, 1913, upon

¹Reported in 145 Pac. 75.

findings in favor of the plaintiffs, in an action for conversion, tried to the court without a jury. Affirmed.

Walter B. Allen, for appellants.

Morris B. Sachs, for respondents.

MOUNT, J.—This action was brought by the plaintiffs against the defendants to recover damages upon an alleged conversion of a team of horses. The case was tried to the court without a jury. A judgment was entered in favor of the plaintiffs for the sum of \$500, being the value of the horses at the time of the conversion, as found by the court. The defendants have appealed.

The facts, as shown by the evidence and as found by the court, are briefly these: In June, 1911, Nardone Brothers were the owners of the horses in question. At that time, the owners executed a chattel mortgage upon these horses, together with other property, in favor of one D'Ambrosio, as security for the payment of \$1,200. This mortgage was duly recorded. Thereafter, Nardone Brothers being in default, the mortgagee brought an action in the superior court for King county to foreclose the mortgage. A receiver was appointed and took possession of the property in that action. After the appointment of a receiver, the owners substituted a bond for the property and took possession of the horses and other property. The plaintiffs in this action became sureties upon that bond. A judgment was entered in that case foreclosing the mortgage. An appeal was prosecuted from that judgment to this court. When the appeal was prosecuted, these plaintiffs became sureties upon the appeal and supersedeas bond. At the time this bond was given, it was agreed between the owner of the horses and the sureties upon the appeal and supersedeas bond that, in case the judgment was affirmed and the sureties were required to pay the judgment, they should become the owners of the horses and other property. The judgment was thereafter

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affirmed in *D'Ambrosio v. Nardone*, 72 Wash. 172, 129 Pac. 1092, and these respondents paid the amount of the judgment, which was \$1,316.25. Thereupon Nardone Brothers authorized the respondents to take possession of the horses as owners.

Pending that litigation, the Nardones took this team of horses to the appellants in this case, Watson Brothers, and authorized them to keep the horses at their stable. The testimony on behalf of the respondents in this action shows that at the time the appellants, Watson Brothers, took the horses into their possession, they agreed to use the horses for their keep; and that, if the appellants in the foreclosure suit should be successful, in that event they should retain the horses as security for a debt owing by the Nardones to Watson Brothers; but, in case the Nardones, upon the appeal, should not be successful, Watson Brothers should deliver the horses to the Nardones, or in satisfaction of the foreclosure judgment. After the respondents in this case had paid the judgment in foreclosure, they demanded the team of horses from the appellants, Watson Brothers, who refused to deliver the horses. The evidence tends to show that, when the Nardones demanded the horses on behalf of the respondents, the appellants made the statement that the horses had been sold and could not be delivered. This testimony was disputed by Watson Brothers, who claimed an agister's lien upon the horses for the sum of \$230.

The appellants make several assignments of error, to the effect, first, that, under the pleadings, the respondents were not authorized to maintain the action for the reason that they are in effect mortgagees, and are therefore not entitled to the possession. It is no doubt true that, if the respondents were mere mortgagees, they would not be entitled to possession until after foreclosure and purchase by them. But the facts in this case show that they are owners, and entitled to possession of the property because the right of possession was authorized by the owners, the Nardones, after the pay-

ment of the judgment in foreclosure. It is plain, therefore, that there is no merit in the point that they are merely mortgagees.

It is next argued that the evidence of value of the horses in October, 1912, was not proper. As we read the evidence, we think it shows conclusively that the value of the horses was fixed at the time of the conversion by the defendants. It is true there was some evidence which showed that at the time the Nardones purchased the horses, they were of a certain value. At the time they placed the horses with the defendants they were of a certain stated value. And there is also evidence that they were of that value at the time the demand was made for the return of the horses. This is clearly within the rule as stated in *Armour v. Seixas*, 80 Wash. 181, 141 Pac. 308.

It is next argued that no conversion was proven. If the testimony of the plaintiffs and of the Nardones and other witnesses is of any weight, this assignment is entirely without force, because it was shown that when the Nardones demanded the return of the horses, this demand was refused, for the reason that the horses had been sold. This was clearly a conversion.

It is next argued that the respondents have never had possession, nor the right of possession, and therefore cannot maintain the action. Of course these were questions of fact. And according to the statement we have heretofore made, it is clear that the respondents at the time they made the demand were entitled to possession of the property, because the ownership and right of possession had been transferred to them by the former owners. If there was no agister's lien upon the property, the owners were entitled to possession.

It is next argued by the appellants that they are entitled to an agister's lien prior to the mortgage. Assuming that, under the statute, the appellants might have acquired an agister's lien prior to the mortgage, which we do not decide, it is plain from the evidence in the case that the defendants

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are entitled to no agister's lien, by reason of a special contract relating to the horses. As we have stated above, it was shown, we think, by a preponderance of the evidence, that at the time the possession of the horses was obtained by the appellants, they agreed that they would keep the horses for their use without cost, and redeliver the horses at any time upon demand. They, therefore, had no valid claim for feeding the horses, and had no agister's lien.

We find no error in the record. The judgment is affirmed.

CROW, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 12057. Department One. December 28, 1914.]

HARRY OCHS, *Appellant*, v. JOHN F. GREEN *et al.*,
Respondents.¹

BANKS AND BANKING—STOCKHOLDERS—AGREEMENTS BETWEEN—SALE OF STOCK—CONDITIONS—PERFORMANCE OR BREACH. Where the principal owners of a bank, which they were about to sell, purchased the stock of a minority stockholder for \$75 per share under an agreement to use their best efforts in settling up its affairs and to distribute to each share its proportion if more than \$75 was realized per share, the principal owners are not liable on the theory that they received \$106.05 per share, where it appears that they sold the bank at \$100 per share "made sound," that the sale did not include the real estate or securities not approved of, and they were compelled to take back the real estate and certain securities not considered of full book value, the assets had depreciated, and there was a wide margin between the actual and book value, diligent efforts had been made to realize upon all the assets, the assets having been administered in good faith, and it is not at all likely that \$75 per share will be realized by any one except the complaining minority stockholder who sold his stock, and who knew the situation and made no objections when statements were exhibited to him.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered August 21, 1913, upon findings

¹Reported in 145 Pac. 82.

in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Merritt, Oswald & Merritt, for appellant.

Burcham & Blair, for respondents.

MORRIS, J.—On June 10, 1910, appellant was the owner of sixty-seven shares of the capital stock of the Harrington State Bank, the remainder of the stock being owned and controlled by respondents, except forty shares owned by J. L. Ball. Respondents, at this time, owned another bank at Harrington known as the Bank of Harrington, and three other banks in that vicinity. The Harrington State Bank was a corporation organized under the banking laws of this state, while the Bank of Harrington was conducted as a partnership business of respondents. The Union Securities Company is a corporation whose business is to own and control various banks in Eastern Washington. Prior to June 10, the respondents and the Union Securities Company had entered into arrangements providing for the sale of the banks controlled by respondents to the Union Securities Company, which arrangements included the transfer to the Securities Company of the stock of the Harrington State Bank. In order to carry out this arrangement, it was necessary for respondents to obtain stock owned by appellant, and negotiations for its purchase were entered into, culminating in the following agreement:

“Harrington, Wash., June 10th, 1910.

“We, the undersigned, having purchased from Harry Ochs sixty-seven shares of the capital stock of The Harrington State Bank, and having paid for the same, in cash, the sum of seventy-five dollars per share, further agree to use our best efforts in settling up the affairs of the above named bank, and whatever is received over and above seventy-five dollars per share, we agree to distribute so that each share of stock will receive its proportion and agree to pay the said Harry Ochs

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or his representatives the amount represented by the sixty-seven shares that we have purchased. John F. Green,
"M. F. Adams,
"A. G. Mitchum."

The action is brought upon the theory that, in transferring the stock of the Harrington State Bank to the Securities Company, the respondents received \$106.05 per share, and it is sought to recover the difference between this sum and \$75 per share.

In order to ascertain the real value of the stock of the Harrington State Bank, as represented in its sale to the Securities Company, it is necessary to ascertain the terms under which it was purchased. It appears that the purchase was represented by two contracts, the first of which is dated June 8 and the second June 13, 1910. The first contract, in so far as it relates to the Harrington banks, provided that the stock of the Harrington State Bank was to be sold at \$100 per share "made sound," but such sale was not to include its real estate or other assets except such as the Securities Company might elect to take, the furniture and fixtures of the Harrington State Bank to be taken at actual value, the real estate of the Bank of Harrington, its furniture and fixtures, to be taken at figures named in the agreement, and a bonus of \$5,000 to be paid as the agreed value of its good will. By the second agreement the respondents bound themselves as guarantors of the book assets of the Harrington State Bank and agreed that, on or before January 1, 1911, they would repurchase at par with accrued interest such of the securities and assets of the Harrington State Bank shown on its books on June 13, 1910, including accounts, bills receivable and renewals, as the Securities Company should designate, and that they would "make good" in ten days after notice any inaccuracy discovered by the Securities Company in the books of the Harrington State Bank. Under this agreement the Securities Company transferred to respondent all the real estate of the Harrington State Bank at the price at which it

had been valued in making up the book value of the stock, and required the respondents to take back at book value certain of the assets and securities of the bank that were not considered of full book value. It is evident—and the lower court has so found—that, at the time of the sale, the assets of the Harrington State Bank were depreciated and that there was a wide margin between the actual and book value, and because of this, a like margin between the actual and book value of the capital stock. The book value of the stock was readily ascertainable, but its real value depended upon the extent of the depreciation of the bank's assets and the amount and value thereof to be transferred to respondents under the sales contract. The book value of the real estate and fixtures transferred to respondents by the Securities Company under the sales contract was \$15,000, and the book value of the other assets and securities taken over prior to January 1, 1911, aggregated \$8,883.55. There is no showing that, in accepting these items at these figures, the respondents were actuated by other than the best business motives and an attempt to carry out their contract with the Securities Company and the appellant. The lower court has also found—and the facts sustain such finding—that the respondents had made diligent efforts to realize upon all assets of the Harrington State Bank retransferred to them by the Securities Company, and in so far as they were able have converted the same into cash for the best price obtainable, and in all things have administered these assets in good faith and for the joint benefit of all parties in interest. The facts, we think, demonstrate that the appellant knew the situation as between the Securities Company and respondents, as to the assets of the Harrington State Bank; that, at least on one occasion in the fall of 1911, the respondents exhibited to him a statement of the then condition of the assets of the bank, and that he was then agreeable to what had been done. The appellant has received \$75 per share for his stock. Respondents have received less, and it is doubtful from the references made to the

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present value of these retransferred securities if respondents ever will receive an amount equal to \$75 per share for the stock owned by them.

We find no error in the findings of the lower court, and its judgment is affirmed.

CROW, C. J., GOSE, PARKER, and CHADWICK, JJ., concur.

[No. 12087. Department One. December 28, 1914.]

EDITH STRIBLEY YARBROUGH, *Appellant*, v. LOUIS PELLISSIER
et al., Respondents.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO EVIDENCE. Where the court makes complete findings of its own, after duly considering the evidence and interrogatories submitted to an advisory jury and the jury's answers thereto, and the judgment is entered upon the findings of the court, exceptions thereto are necessary in order to review the evidence on appeal.

Appeal from a judgment of the superior court for Columbia county, Mills, J., entered November 29, 1913, upon findings in favor of the defendants, upon an advisory verdict of a jury, in an action to obtain title to lands, on a money judgment, for fraud, etc. Affirmed.

A. O. Colburn, for appellant.

Will H. Fouts, for respondents.

MORRIS, J.—This action was originally brought to establish a one-half interest in appellant in certain farm lands upon the grounds of want of capacity, fraud, and undue influence in the obtaining of title from appellant's parents. Upon the trial, it appearing to the satisfaction of appellant that the title to the land was in innocent purchasers, the relief against the land was abandoned, and a money judgment demanded against the original grantee. The case was submitted to an

¹Reported in 145 Pac. 81.

advisory jury, to whom interrogatories were submitted involving each ground for relief as alleged by appellant. These interrogatories were, in each instance, answered adversely to appellant's contention; the jury finding in, effect, that there was no want of capacity, no deception, fraud, nor undue influence, but that the sales were fairly made and for an adequate consideration. The trial court adopted the findings of the jury, incorporated them in its own findings, and entered judgment for respondent. No exceptions were taken to these findings by appellant, and respondents contend that this court cannot review the evidence but must accept the findings and inquire only as to whether or not the findings support the judgment. This contention is well taken under numerous cases. *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868.

Appellant urges that this was a jury trial and that no exception need be taken in such cases to any finding of fact. No finding made by the jury is here for review. The jury was used as advisory only and, though accepting the findings of the jury as correctly determining the facts, the court has not rested its decision upon such findings, but made full and complete findings of its own after, as it recites, "having duly considered the evidence and the interrogatories submitted to the jury and the answer returned by them into court and the written brief of respective counsel for plaintiff and defendant." Upon such findings so arrived at, the judgment appealed from was entered, and not upon the answers made by the jury to the interrogatories submitted. They therefore differ in no degree from findings of fact made by the lower court in any other case, and if they would be reviewed due exception must be taken to them. The findings support the judgment. We might add that, upon the merits, we are convinced the judgment is correct.

The judgment is affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

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[No. 12182. Department One. December 28, 1914.]

DORA HAYNES, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS — CLAIMS — PRESENTATION — STATUTORY PROVISIONS. Rem. & Bal. Code, § 7995, providing that claims for damages against a city shall be filed with the city clerk within thirty days, and in cases of cities of the first class, shall comply with its charter provisions, which required the claim to be filed within thirty days and "be sworn to by the claimant" which provisions are made mandatory, is not unreasonable, as applied to a case where the injured person was delirious and so incapacitated as to be unable to make and swear to a claim within the thirty days; and it is not sufficient that, within the thirty days, the claimants filed a claim sufficient in all respects except that it was sworn to by the father and not by the claimant.

STATUTES — TITLES AND SUBJECTS — REVISION — AMENDMENTS. A statute providing that the filing of claims against a city shall be filed with the city clerk and also comply with all valid city ordinances respecting the subject, does not violate Const., art. 2, § 37, providing that no act shall be amended by mere reference to its title, in that it attempts to embody city charter provisions by reference only.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 28, 1914, dismissing an action for personal injuries sustained by reason of a defective street, upon sustaining a demurrer *ore tenus* to the complaint. Affirmed.²

Geo. B. Cole and John Wesley Dolby, for appellant.

James E. Bradford and Howard M. Findley, for respondent.

Gose, J.—This is an action for damages for personal injuries to the plaintiff, caused by the alleged negligence of the defendant. Immediately after the jury was empaneled and sworn to try the case, the defendant demurred to the complaint *ore tenus*, upon the ground that the complaint does

¹Reported in 145 Pac. 78.

²Rehearing pending.

not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff electing to stand upon her complaint and declining to plead further, a judgment was entered dismissing the action. This appeal followed.

It is alleged in the complaint that Crockett street, in the respondent city, was open for travel and traveled by the public; that there was a deep chasm in the street, and that there were no lights or barriers to indicate its presence or to warn the public of the danger; that, on the 30th day of March, 1913, about midnight, an automobile in which the appellant was riding as a passenger, was driven into the chasm, and that she sustained serious and permanent injuries. The facts constituting the negligence of the city and the injuries which the appellant sustained are set forth in the complaint with great detail. The complaint shows that the respondent city was culpably negligent.

It is alleged that the appellant was delirious and mentally and physically incapacitated to transact business from the time she met her injury until the fourth day of June following; that on April 26, her father verified and presented a claim for damages in her behalf to the city, and that on the 5th day of June, and as soon as she was mentally and physically able to do so, she duly verified her claim for damages and filed it with the city. Both claims were rejected. The claim presented by the appellant's father is sufficient upon its face in every respect, except that it was verified by him alone. The appellant's claim complies with the conditions of the city charter except as to the time of its presentation.

Section 29, art. 4, of the charter of the respondent city provides that all claims for damages against the city must be presented to the city council and filed with the clerk "within thirty days after the time when such claim for damages accrued, . . . and be sworn to by the claimant." Laws 1909, page 181 (Rem. & Bal. Code, § 7995), provides that claims for damages sounding in tort against a city of the first

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class shall be presented to and filed with the city clerk or other proper officer of such city "in compliance with valid charter provisions of such city;" that the claim must contain "in addition to the valid requirements of such city charter relating thereto," a statement of certain facts, and that "the provisions of this act shall be in addition to such charter provisions, and such claims for damages in all other respects shall conform to and comply with such charter provisions." Section 3 (Id., § 7997), declares that compliance with the provisions of the act is mandatory upon all claimants presenting and filing claims for damages.

The first contention is that the act is unconstitutional. We held to the contrary in *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913 A. 844, 34 L. R. A. (N. S.) 1166, and *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

It is argued that the statute is violative of art. 2, § 37, of the constitution, which provides:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length,"

in that it attempts to embody the charter provisions of cities of the first class by reference only. This contention cannot be upheld. *Carstens v. De Sellem*, 82 Wash. 643, 144 Pac. 934; *Connor v. Seattle*, 76 Wash. 37, 135 Pac. 617; *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113.

It is contended that, under the facts pleaded, the provisions of the city charter requiring a claim to be filed within thirty days is unreasonable, under the rule announced in *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743; *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143, and *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144.

We pointed out in *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58, that all these cases were decided before the enactment of the laws of 1909. In *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365, in construing Laws 1909, page 627 (Rem. & Bal. Code, § 7998), which provide that all claims for damages against any city or town of the second, third, or fourth class must be presented to the city or town council and filed with the city or town clerk "within thirty days" after the time when such claim for damages accrued, we held that there could be no recovery where the claim was not presented within thirty days, even if the physical and mental incapacity of the plaintiff continued through the entire period fixed by the statute for its presentation. The same principle was enunciated in *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501, and *Hall v. Spokane*, 79 Wash. 303, 140 Pac. 348. In the last two cases, however, plaintiff's incapacity did not run through the entire period of time. In *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, it was said that charter and statutory provisions in respect to the reasonableness of the requirements touching the presentation of the claims for torts against a municipality are upon the same plane. It would seem illogical to hold that the thirty-day limitation period is conclusive upon the courts in the smaller cities and towns, and that the same limitation is unreasonable in cities of the first class because depending upon a charter provision. We have held that, the legislature having spoken in respect to smaller cities and towns, the question of reasonableness or unreasonableness is foreclosed. The statute establishes the public policy of the state, and the same dignity must be accorded to charter provisions with a like period of limitation in cities of the first class. In *Ransom v. South Bend*, after referring to the rule announced in *Born v. Spokane* and *Ehrhardt v. Seattle*, we said:

"The appellant invites us to apply this rule of interpretation to the statute. This we cannot do without trenching upon powers vested exclusively in a co-ordinate branch of the

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state government. When the law-making branch of the government has spoken, the courts may interpret, but cannot add to or take from, the clear and unambiguous meaning of the law. To do so would be legislation rather than interpretation. The policy, expediency, and wisdom of a statute are legislative and not judicial questions."

The claim presented by the father did not comply with the provisions of the city charter, because it was not "sworn to by the claimant." In *Cole v. Seattle*, we held that this clause was reasonable and that it was an "earnest of that good faith which the city has a right to demand."

The judgment is affirmed.

Crow, C. J., CHADWICK, MORRIS, and PARKER, JJ., concur.

[No. 12187. Department One. December 28, 1914.]

ELIZABETH KELLY, *Respondent*, v. THE CITY OF SPOKANE,
Appellant.¹

APPEAL—REVIEW—HARMLESS ERROR—REJECTION OF EVIDENCE. In an action for personal injuries from stepping into a small hole near the edge of a sidewalk, it is harmless error to reject a photograph of the hole, where it simply showed a small shadow near the place where all the witnesses located the hole; since the photograph did not contradict any of the witnesses on any material fact, and being of no material aid, did not affect any substantial rights, within Rem. & Bal. Code, § 307, requiring such errors to be disregarded.

EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY. The practice of admitting photographs and models is to be encouraged as an aid to the comprehension of physical facts.

MUNICIPAL CORPORATIONS — STREETS — INJURIES — DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE. A person approaching a railroad crossing intent on that danger and the danger from the sweep of a crossing guard, is not, as a matter of law, guilty of contributory negligence in stepping into a hole at the edge of the sidewalk, about 10 or 12 inches square, as she had a right to assume that the city had performed its duty as to any part of the walk.

¹Reported in 145 Pac. 57.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 9, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by reason of a defective sidewalk. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant,
and *Dale D. Drain*, for appellant.

Scott & Campbell, for respondent.

Gose, J.—This action was brought to recover compensation for personal injuries sustained by the plaintiff. She claims that she stepped into a hole in a sidewalk, in one of the business streets of the defendant city, causing her to fall in such a manner as to inflict upon her serious bodily injuries. The jury accepted her view of the case, and its verdict was made effective by a judgment. This appeal followed.

The material facts fall within a very narrow compass. The respondent said that she was traveling north, on the west side of Post street, a business street in the city of Spokane, in the daytime; that, in crossing the track of the Northern Pacific Railway Company, she kept close to the west margin of the street in order to avoid the sweep of a crossing guard which she feared might be suddenly lowered; that, at a point a few feet north of the crossing and a few inches from the inside of the walk, she stepped into a hole in the brick walk, about ten inches by twelve inches in dimensions, and fell and was seriously injured. She said she was seeking to avoid two elements of danger, viz., the sweep of the crossing guard, in event it should be suddenly let down, and passing engines, and that, with her attention momentarily diverted by these thoughts, she stepped into the hole without observing its presence. She also said that the hole extended to within two or three inches of the building, and that, whilst she had before traveled the walk, she had not observed the hole. Another witness said that the hole had been there for a considerable

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period of time before the plaintiff met her injury. All the witnesses agree that the hole was about ten inches by twelve inches in dimensions, and that it extended to within a few inches of the building. The walk was made of bricks five inches in width, ten inches in length, and two and one-half inches in thickness. There was a hiatus in the walk of probably two bricks. The evidence does not show whether the bricks were left out in the beginning or were later removed. The significant fact is that, under all the evidence, the gap was there.

At the close of the respondent's evidence, the appellant challenged its sufficiency. The challenge being denied, it then sought to introduce a photograph in evidence. This was rejected; whereupon defendant again challenged the sufficiency of the evidence and rested its case.

The errors claimed are, (1) the rejection of the photograph; and (2) the denial of the challenge to the sufficiency of the respondent's evidence.

The photograph was rejected because the court was evidently of the opinion that it had not been sufficiently identified; that is, because it was not shown to correctly photograph the hole with respect to its proximity to the adjacent building. The respondent's witnesses, on cross-examination, said that, while it did not seem in some respects to correspond with their recollection of the location of the hole, it was substantially correct. Assuming that the photograph was sufficiently identified, and that the refusal of the court to admit it in evidence was error, we think it was error without prejudice. The photograph merely shows a small shadow near the inside of the walk practically where all the witnesses located the hole. It does not show that there was no hole into which the respondent could have stepped. The location and dimensions of the hole were testified to by three witnesses, besides the respondent. They were all in substantial harmony with each other and with the respondent upon both points. If the photograph contradicted any wit-

ness upon any material fact, or if it would have materially aided the jury in arriving at its verdict, we would not hesitate to remand the case for a new trial. In our opinion it does neither. We are admonished by the statute to disregard an error which does not affect the substantial rights of the complaining party. Rem. & Bal. Code, § 307 (P. C. 81 § 303). *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673.

We deem it pertinent, however, to say that the practice of admitting photographs and models in evidence in all proper cases should be encouraged. Such evidence usually clarifies some issue and gives the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses.

The second point urged is that the respondent was guilty of contributory negligence, which was the proximate cause of the injury. It is the duty of a city to use reasonable care to maintain its streets and sidewalks in reasonably safe condition for travel. The traveler who has no knowledge to the contrary may proceed upon the assumption that the city has fulfilled its duty. Momentary distraction of the attention of the pedestrian does not as a matter of law constitute contributory negligence. *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357.

It is argued that it was the duty of the respondent to keep near the center of the sidewalk, the course generally followed by the public. As a matter of law, she had a right to travel upon any part of the walk. The court would be taking a liberty not justified by law were it to hold that the law reserves any part of an unobstructed walk from use by the public. It was for the jury to say, upon all the facts, what a reasonably prudent person ought to have done under the circumstances present.

The judgment is affirmed.

CROW, C. J., CHADWICK, PARKER, and MORRIS, JJ., concur.

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[No. 12175. Department Two. December 28, 1914.]

E. W. BENJAMIN, *Plaintiff*, v. A. B. ERNST, *Respondent*,
INTERNATIONAL MERCANTILE AND BOND COMPANY,
Appellant.¹

APPEAL—NOTICE—ORAL NOTICE. An oral notice of appeal at the time of the rendition of the judgment is sufficient, under Rem. & Bal. Code, § 1719.

PLEADING—COMPLAINT—DEMURRER—WAIVER. Under Rem. & Bal. Code, § 263, providing that the objection that the complaint does not state a cause of action may be taken any time, either in the superior or supreme court, pleading over after a demurrer is sustained does not waive the objection.

APPEAL—RECORD—STATEMENT OF FACTS. Where an appeal is based upon the insufficiency of the complaint, no statement of facts is necessary.

GARNISHMENT—DEFENSES—ASSIGNMENT OF DEBT—DEFAULT OF GARNISHEE—JUDGMENT—CONCLUSIVENESS—LACHES—QUIETING TITLE—ADVERSE CLAIMS. One indebted under a judgment which had been assigned before entry, who, upon being garnisheed by a third party in a suit against the judgment creditor, allowed a judgment to go against him by default as garnishee, cannot, after the lapse of two years, bring an action to determine to whom he must pay the judgment, under Rem. & Bal. Code, § 199, providing for an action to determine adverse claims by bringing all parties before the court in case more than one is interested in or claims to be the owner of the subject-matter of the suit; since, if he had notice of the assignment of the original judgment, he was bound to appear and defend the garnishment; and if the garnishment judgment was obtained by fraud and without notice to him of the assignment or opportunity to defend, his only remedy was to proceed within one year to set aside the judgment of garnishment, under Id., §§ 464, 467; since, by his own neglect, he allowed two judgments to go against him.

JUDGMENT—BY DEFAULT—CONCLUSIVENESS—COLLATERAL ATTACK. Where a garnishee had suffered a default, and claimed he had no notice of the defense that his debt had been assigned, his action to bring all parties before the court to determine to whom he should pay the judgment, under Rem. & Bal. Code, § 199, is a collateral attack upon the garnishee judgment, which can only be held void for reasons affirmatively appearing upon the record.

¹Reported in 145 Pac. 79.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 24, 1914, restraining the collection of a judgment entered against a garnishee, after a hearing before the court. Reversed.

Cassius E. Gates, for appellant.

Vernon W. Buck, for respondent.

MOUNT, J.—This appeal is from a judgment of the superior court for King county, restraining and enjoining the appellant from collecting a judgment, obtained against A. B. Ernst where Mr. Ernst was a garnishee defendant.

The respondent moves to dismiss the appeal for the reason that no notice of appeal was served or given as required by law; and also for the reason that no statement of facts or bill of exceptions has been filed. It appears from the transcript that, when the appellant appeared in the action, it filed a demurrer to the complaint of the respondent Ernst on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and an exception reserved. The appellant thereupon filed an answer. A trial was had and a judgment rendered as above stated. At the time of the rendition of the judgment, notice of appeal was given in open court. This was clearly sufficient under the statute. Rem. & Bal. Code, § 1719 (P. C. 81 § 1189).

It is contended by the respondent that, because the appellant did not stand upon his demurrer, but permitted a judgment to be entered, that he has waived the error. But this is not the rule. The statute provides at § 263 (P. C. 81 § 233) that the objection that the complaint does not state facts sufficient to constitute a cause of action may be taken at any time, either in the superior or the supreme court. This court has many times held that this objection is not waived by filing an answer. *West v. Martin*, 47 Wash. 417, 92 Pac. 334.

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It is true, no statement of facts or bill of exceptions has been filed. The appellant is basing the appeal upon the insufficiency of the complaint, and a statement of facts in such case is not required. The motion is denied.

The facts in the case are not disputed. As shown by the complaint and admitted by all parties, they are substantially as follows: In December, 1909, E. W. Benjamin brought an action against A. B. Ernst and others, in the superior court for King county. After appearance of the defendants in that action, a judgment was entered against the defendant Ernst, and in favor of Benjamin, the plaintiff therein. This judgment was entered on November 12, 1910. Prior to the entry of that judgment Mr. Benjamin assigned the judgment to his attorney, H. O. Durk. This assignment was filed in the clerk's office on August 1, 1910. In December, 1910, the International Mercantile & Bond Company brought an action against E. W. Benjamin and others, and served notice of garnishment upon A. B. Ernst. Ernst made default and a judgment was entered against him as garnishee defendant on August 28, 1911. The clerk, in entering this judgment, indexed the judgment against B. Ernst instead of against A. B. Ernst. In November, 1913, more than two years after the entry of the latter judgment, Ernst filed an application in the action of E. W. Benjamin v. A. B. Ernst, alleging the judgment of Benjamin against him on November 12, 1910; that on December 17, 1910, notice of garnishment was served upon him in an action of the International Mercantile & Bond Company v. Benjamin *et al.*; that, as he was owing said Benjamin, he made no appearance in that action; that thereafter, in September, 1913, wishing to pay the judgment, he examined the records and found that the judgment in the case of Benjamin v. Ernst had been assigned to Howard O. Durk, and he thereupon paid Durk a part of that judgment; that later he was informed that the International Mercantile & Bond Company claimed a judgment against him as garnishee defendant in the case of International Mercantile & Bond

Company v. Benjamin. He also alleged that the only money he ever owed to the said Benjamin was the indebtedness represented by said judgment. He prayed that both Benjamin and the International Mercantile & Bond Company be brought into court, and that the court should determine to which one of the parties he should pay the judgment entered against him. The court, upon these facts, entered a decree restraining the International Mercantile & Bond Company from collecting the judgment obtained against A. B. Ernst in the case of International Mercantile & Bond Company v. Benjamin and A. B. Ernst, garnishee defendant.

The only question presented upon this appeal is the sufficiency of the facts alleged and admitted as stated above. The respondent in this case no doubt intended his proceeding to come within the provisions of Rem. & Bal. Code, § 199 (P. C. 81 § 547), which provides:

“Anyone having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action.”

But we are satisfied that the facts in this case do not bring it within the provisions of that section, because in this case the appellant, the International Mercantile & Bond Company had a judgment against the defendant A. B. Ernst which was obtained by default against said Ernst. The fact is conceded that Mr. Ernst was indebted to Mr. Benjamin upon the judgment which Benjamin obtained against him. He alleges in his complaint that he was not informed of the assignment of the Benjamin judgment to Mr. Durk. Mr. Ernst either had notice of the assignment or he did not have notice of it. If he had notice of the assignment, he was required to appear and answer the writ of garnishment. When

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he permitted a judgment by default to be entered against him upon that writ, he was clearly bound to pay that judgment. If he had no notice of the assignment of the judgment in the case of Benjamin v. Ernst, that assignment, of course, was void, and the payment of the judgment in garnishment satisfies both judgments to the extent of that payment. If the judgment of the International Mercantile & Bond Company was obtained by fraud practiced against Mr. Ernst, or if, on account of unavoidable casualty or misfortune which prevented him from defending the action, the judgment was taken against him, his remedy was to proceed within a year to set aside the judgment upon these grounds. Rem. & Bal. Code, §§ 464, 467 (P. C. 81 §§ 1163, 1169).

This he did not do, but waited more than two years, and then set up the fact that there was but one debt owing to these different parties, and asked the court to determine to which of these parties the debt should be paid. As a matter of course, if the former judgment, namely the judgment of Benjamin v. Ernst is not paid by the payment of the judgment of the International Mercantile & Bond Company v. Ernst, then, by his own neglect, he has permitted two judgments to go against him. In short, by his own failure and neglect, instead of owing one debt, he apparently owes two. His remedy, if he has a remedy, depends upon the validity of the assignment from Benjamin to Durk. If that assignment was made in good faith, and Mr. Ernst had notice of it, or was required to take notice of it, it was his duty to answer the writ of garnishment in the other case. His neglect to answer that writ of garnishment cannot be made the basis of a collateral attack of the judgment in the garnishment case. This is clearly, we think, a collateral attack upon that judgment. That judgment can only be held void for reasons which affirmatively appear upon the record. *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757.

There is nothing in the pleadings in this case to show that that judgment is void. In fact it is conceded that it was obtained by reason of the neglect of the respondent Mr. Ernst to defend against it. We are satisfied, therefore, that the complaint is not amendable and that the trial court should have sustained the appellant's demurrer and dismissed the action.

The judgment is reversed, and the proceeding is dismissed.

Crow, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12030. Department One. December 29, 1914.]

CHARLES BENNETT, *Respondent*, v. OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY *et al.*, *Appellants*.¹

DAMAGES—PERSONAL INJURIES—MENTAL ANGUISH—INSTRUCTIONS. In an action for personal injuries from a blow on the head, resulting in pain, nervousness, and headaches, it is not proper to instruct, upon the subject of damages, that the jury may take into consideration the probable suffering of mental anguish in the future, where there was no evidence tending to show mental anguish other than pain and suffering actually incident to such an injury.

SAME—PROBABLE FUTURE SUFFERING—REASONABLE CERTAINTY. Damages for future pain and suffering should only be granted when the jury can find from a preponderance of the evidence that future pain and suffering is reasonably certain to result from the injuries and continue in the future.

Appeal from a judgment of the superior court for Lewis county, Wright, J., entered November 13, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a train wreck. Reversed.

Bogle, Graves, Merritt & Bogle, George T. Reid, and J. W. Quick, for appellants.

Govnor Teats, Leo Teats, and Ralph Teats, for respondent.

¹Reported in 145 Pac. 62.

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Opinion Per CHADWICK, J.

CHADWICK, J.—Plaintiff was a passenger upon a passenger train, operated by the Oregon-Washington Railroad & Navigation Company over the tracks of the Northern Pacific Railway Company. Plaintiff had been riding in the day coach. He went forward into the smoker, and while standing in the car with his hands upon the back of a seat, the train was wrecked. The car in which he was riding left the track. The forward car smashed in the front end of the smoker, and plaintiff was struck upon the head by the end of the car or wreckage. He suffered a scalp wound. Defendants admit liability. The case was submitted to the jury for a determination of the amount of damages sustained by the plaintiff.

It appears that, prior to the injury, plaintiff was a strong, robust man; that, immediately after the injury, he rode in an automobile to the hospital in Tacoma, where his wounds were dressed. He then went to a hotel, where he was called upon three or four times by the physician who had cared for him at the hospital. He then went to Georgetown where his wife's daughter lived, and after about a week, he returned to his home at Dryad, Washington, where he is engaged in the barber business. The testimony tends to show that he was rendered weak and nervous by reason of the accident; that he was unable to attend to his business for about a month or six weeks. From that time on, he has carried on his trade himself. He says that he is still nervous and suffers from headaches. The case went to trial, resulting in a verdict for plaintiff in the sum of \$1,500.

Error is assigned in that the court instructed the jury as follows:

"If you find for the plaintiff, you will allow him such sum as you find from the evidence will reasonably and fairly compensate him for the injuries received. In arriving at this amount, you should take his business into consideration, and the time, if any, he lost by not being able to work at his business through injuries received by him in the wreck. You

should take into consideration suffering, pain and mental anguish, if any, which he has undergone by reason of the injury; and if you find from the evidence that he will probably suffer pain and mental anguish in the future from such cause, then you should consider such probably future suffering also in making up your verdict.

"From all of these considerations, you should decide upon such sum as in your judgment will fairly and reasonably compensate him for such injuries as you find he has received."

"It is not an easy matter to fix the amount which should be allowed in cases of this character, particularly for pain and mental suffering, if any, but you should bring to bear your own judgment, and, if you find for the plaintiff, assess such damages as you consider reasonable."

We have italicized those parts of the instruction which are objected to.

If there be evidence of a state of facts from which a jury might find mental anguish, or an injury is disclosed that would shock the senses of fair minded men, or invite the unfeeling to ridicule, it would be proper for a court to submit, as an element of the damages sustained, the mental anguish of the injured person; but where, as in this case, there is no evidence tending to show any mental anguish or anything other than the pain and suffering naturally incident to an injury like the one complained of, it is improper to instruct upon that element for it can only lead the jury into the realm of speculation, with the possibility of penalizing the negligent party, whereas compensation for the injured one is the sole object of the law.

This court has discussed this phase of the law in the following cases: *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Cole v. Seattle, Renton etc. R. Co.*, 42 Wash. 462, 85 Pac. 3; *Nelson v. Western Steel Corporation*, 61 Wash. 672, 112 Pac. 924. While these cases all sustain a recovery for mental anguish, they are likewise authority to the point that a recovery cannot be had upon that theory unless there is some evidence or a con-

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dition is revealed that would warrant the court in submitting it to the jury. As we have said, there is nothing in the testimony in this case to show that respondent has lost, or will lose, the comfort and companionship of other people, be an object of pity, or abhorrence, or ridicule, or otherwise be put under future mental anguish because of his injury.

Without discussing the remaining assignment, but granting, without deciding, that the direction to the jury: if "you find from the evidence that he will probably suffer pain and mental anguish in the future from such cause, then you should consider such probable future suffering also in making up your verdict," is a proper statement of the law, we would suggest that an instruction falling within the rule announced in *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873, and *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916, that is, that a person is entitled to recover for future pain and suffering only when the jury can find from the evidence that future pain and suffering is reasonably certain to result from the injuries and continue into the future, is more proper and should be followed in the event of a retrial. It is not for the jury to speculate upon the likelihood or probability of such future pain and suffering; it must be convinced, from a fair consideration of the evidence, that it is reasonably certain that it will be so.

For the reasons assigned, this case is reversed and remanded for a new trial.

Crow, C. J., Gose, PARKER, and MORRIS, JJ., concur.

[No. 12043. Department One. December 29, 1914.]

JENNIE KROEGER *et al.*, *Appellants*, v. GRAYS HARBOR
CONSTRUCTION COMPANY, *Respondent*.¹

DEATH—WRONGFUL DEATH—NEGLIGENCE—TRESPASSERS—DEGREE OF CARE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. One who goes upon a trestle used in the construction of a jetty, in search of employment, and after being refused, loiters about the place in a dangerous position for an inexcusable length of time near the sweep of a derrick used in unloading rock from a heavy skip, is a mere trespasser, or at least but a licensee, whom the defendant was only bound to refrain from wilfully and wantonly injuring; and he was guilty of contributory negligence, precluding any recovery for his death, when struck by the skip, where there was no evidence of an intention to wantonly or wilfully injure him, or even that his presence was known.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered February 9, 1914, dismissing an action for wrongful death, upon granting a nonsuit. Affirmed.

Hugo Metzger and *A. Emerson Cross*, for appellants.

W. H. Abel and *A. M. Abel*, for respondent.

CHADWICK, J.—Defendant had a contract to supply the government with rock for the jetty at Grays Harbor. The rock was transported on cars from the inland to a trestle or spur running into the Chehalis river. From these cars, it was loaded on scows, made fast alongside of the trestle. The manner of unloading was to put the rock into a wooden skip which was about twelve feet long and five feet wide. The skip, when being filled, was made to rest on a parallel track. It was raised by means of a derrick, the boom of which swung in a circle. When the skip had been filled, it was raised, carried over the car and returned to the scow. When empty, it was raised, carried over the car and held until the head

¹Reported in 145 Pac. 63.

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"hooker on" indicated where he wanted it lowered, when one of the workmen, from a vantage point on the car, gave a signal to the engineer to drop the skip. The skip weighed something over a ton.

Plaintiffs' decedent went to the place where the work was being carried on, and asked the foreman in charge for employment. There being no place for him, he remained for some little time talking with the employees. At the time of the accident, to be presently mentioned, he was standing on the trestle on the off side of the car that was being unloaded. The engineer, on signal, raised the skip from the scow, swung it over the car, and in obedience to a like signal from one of the employees on the car, lowered it. It struck Kroeger on the forehead, knocked him down with such force that he was rendered unconscious and so wounded him that he afterwards died.

Plaintiffs brought this action, alleging that the defendant was guilty of negligence in the operation of the skip, and further, that while decedent was standing in a place of apparent safety and in ignorance of any danger, the defendant, knowing of his presence, carelessly, negligently, wantonly and wilfully permitted the skip to be suddenly dropped from its elevated position. It appeared that Kroeger had finished his errand and had no business or employment in or about the work at the time the accident occurred. He was waiting to go with some of the crew who were to go off shift in a few minutes.

At the close of plaintiffs' case, defendant moved for a non-suit, which was granted by the court, for the reasons that it did not appear that the defendant was guilty of negligence and that decedent Kroeger was guilty of negligence on his part.

We think the judgment of the lower court was clearly right. Defendant owed Kroeger no duty other than to refrain from wilfully and wantonly injuring him. The occurrence was a pure accident. It is shown that Kroeger was

not within the range of vision of the engineer, and there is testimony from which it can be clearly inferred that the signal man undertook to arrest the lowering of the skip when he realized that he was in a place of danger. It does not appear that the engineer or signal man had any actual notice, or reason to believe, that Kroeger was in line with the fall of the skip, unless an inference can be drawn from the fact that he had been on the trestle from three to four minutes, as two of the witnesses estimated the time. This would not raise an inference of negligence, for as we have frequently held, negligence is not to be presumed but must be proved as a fact. If there had been a duty resting upon defendant to keep a lookout for intruders it would have been for the jury to say whether Kroeger had been on the trestle long enough to raise an implication of notice. There was no such duty. Obviously if his presence had been known to those operating the machinery, the accident would not have happened, for men in such employments are not to be charged with willful murder. The evidence affirmatively shows that Kroeger had remained in a position of apparent danger an inexcusable length of time, considering all of the attending circumstances; that he was taking no account of his own safety, and that he was looking down, with his hat "kinda pulled down over his eyes."

To allow a recovery in this case would be to put upon a defendant similarly situated the duty of maintaining an extraordinary degree of care, whereas, the rule is that a defendant owes no duty of actual care, while a duty of vigilance or the highest degree of care is put upon one who, for his own purposes, goes upon the premises of another and puts himself in a place of danger. 2 Cooley, Torts (3d ed.), p. 1268; 1 Thompson, Negligence, 946-948; 8 Thompson, Negligence (White's Supp.) 946.

The distinction between a trespasser and a licensee is clearly drawn in *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526. Within the rule of that case, Kroeger was

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a trespasser, and to sustain a recovery it was incumbent upon plaintiffs to show that defendant's agents knew of his presence in time to avoid the injury. As we have said, proof of this fact is entirely wanting. Other cases decided by this court bearing in greater or less degree upon the question at bar, are *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452; *Johnson v. Great Northern R. Co.*, 49 Wash. 98, 94 Pac. 895; *West v. Shaw*, 61 Wash. 227, 112 Pac. 243. The case of *Metcalf v. Cunard S. S. Co.*, 147 Mass. 66, 16 N. E. 701, is in point. Plaintiff went on board a ship to consult the ship's doctor. He met a supposed officer of the ship and, upon inquiry was directed to the doctor's cabin. The way pointed out was a direct way, although a more roundabout one would have taken him there and would have avoided the danger. Near the end of the passage way which he had followed, was an uncovered hatch at which the vessel was loading. A companion said, "Look at those fellows down there." Just as the plaintiff emerged from the passage way he turned his head and almost immediately was struck on the back and knocked into the hold by a bag of flour which swung across the deck on its way to be lowered into the hatch. It was held that the plaintiff was, at the highest, a mere licensee, if not a trespasser; that the danger was perfectly manifest and that there had been no duty to warn the plaintiff against such dangers. See, also, *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. 476, 56 N. Y. Supp. 18; *Berlin Mills Co. v. Croteau*, 88 Fed. 860; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; *Weitzmann v. Barber Asphalt Co.*, 190 N. Y. 452, 83 N. E. 477, 123 Am. St. 560; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *O'Brien v. Union Freight R. Co.*, 209 Mass. 449, 95 N. E. 861, 36 L. R. A. (N. S.) 492; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718, where it is said:

"He went there on his own business, and in returning he was subserving his own purposes only. The precise question

is whether a person who goes upon the land of another without invitation to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous, which he passes in the course of his journey if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances."

Paraphrasing the words of the court in *McConkey v. Oregon R. & Nav. Co.*, *supra*, Kroeger, by the exercise of common judgment, should have known that to occupy the place he did would be attended by great hazard. He knew that he was not upon a highway for pedestrians but that the trestle was built and maintained and was being used for railway purposes. While he may have believed it was in such condition as would enable him to occupy it with safety, yet the environment, time, and his relation to the defendant were such as to give him no right to act upon such belief or to rely upon any duty owing by the defendant to maintain the place in safety for him.

We agree with the observation of the deceased, who said, upon recovering consciousness, that the accident occurred in consequence of his own fault.

The judgment is affirmed.

Crow, C. J., Gose, Morris, and Parker, JJ., concur.

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[No. 12155. Department One. December 29, 1914.]

J. G. CROUCH, *as Administrator of the Estate of Edwin R. Knight, Appellant*, v. E. W. ROSS, *Commissioner of Public Lands, Respondent*.¹

CERTIORARI—RECORD—SCOPE OF REVIEW—EVIDENCE—NECESSITY. Upon certiorari to review the decision of the commissioner of public lands ordering a cancellation of a state deed of oyster lands, in which the commissioner was unable to make a full return bringing up all the evidence, by reason of the stenographer's inability to read her notes, the decision of cancellation must be vacated, without prejudice; since Rem. & Bal. Code, § 1010, relating to review of certiorari proceedings depending on the facts alone, contemplates a review of the evidence upon the record below; and findings of the commissioner, cannot, in the absence of the evidence, be taken as the verdict of a jury.

PUBLIC LANDS—FINDINGS OF COMMISSIONER—REVIEW—CERTIORARI—EVIDENCE. Where the commissioner of public lands took evidence, and made findings thereon, certiorari brings such evidence up for review, even if the commissioner might have determined the matter on his own investigation without the taking of evidence.

EVIDENCE—JUDICIAL NOTICE—PRACTICE IN DEPARTMENT. The court will take judicial notice of the practice of the commissioner of public lands to subpoena witnesses and administer oaths.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered December 12, 1913, dismissing certiorari proceedings to review an order of the commissioner of public lands for the cancellation of a deed of state oyster lands. Modified.

T. M. Vance (*Fenley Bryan, C. A. Gordon, and Gordon & Easterday*, of counsel), for appellant.

The Attorney General and *R. E. Campbell, Assistant* (*F. H. Murray*, of counsel), for respondent.

CHADWICK, J.—Without reference to antecedent facts, it is enough to say that, on January 21, 1911, an application was made by an interested party to cancel a deed theretofore

¹Reported in 145 Pac. 87.

made by the commissioner of public lands on July 14, 1906, whereby the state conveyed to one Henry G. Knight 96.48 acres of tide land for oyster cultivation, said deed being executed under chapter 16, title LI, Rem. & Bal. Code, §§ 6799-6805 (P. C. 373 §§ 43-61). The application was based on several grounds, among others, that the land had not been used by the grantee or by his grantees for the cultivation of oysters; that the land was not suitable for cultivation of oysters; and that it had been used for other purposes. A hearing was had before the commissioner of public lands in which the parties immediately concerned participated. The commissioner of public lands made findings, *inter alia*, that the land had not been devoted to the cultivation of oysters, and was not suitable for the cultivation of oysters, and accordingly canceled the deed. Whereupon, the relator sued out a writ of certiorari, in the superior court of Thurston county, to which the commissioner made return. At the time of the hearing, the commissioner took the testimony of several witnesses, and it appearing by the writ that the testimony of the witnesses had not been transcribed and made a part of the record, the court directed a further return. It appears that the commissioner was unable to certify the testimony because the stenographer who had taken it was not thereafter able to read or transcribe her notes. On motion of the respondent's counsel, the proceeding was dismissed, the court holding that it had no jurisdiction in the premises.

We cannot concur in the reasons given for dismissing the proceeding. The court had unquestioned jurisdiction over the subject-matter and of the parties, but we nevertheless believe that, no question of law appearing which was determinative of the case, it was not only within the discretion of the court but was in a sense incumbent upon him to dismiss the proceedings.

The writ of certiorari, as it has been defined by our statute, is an enlargement of the common law writ and, in a proper case, puts upon the court the duty of inquiring into the facts

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upon which the judgment rests. It is provided in Rem. & Bal. Code, § 1010 (P. C. 81 § 1745), that questions involving the merits to be determined by the reviewing court are:

“(1) . . . (2) . . . (3) . . . (4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination. (5) If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, would be set aside by the court, as against the weight of evidence.”

In *State ex rel. Spokane & Inland Empire R. Co. v. State Board of Equalization*, 75 Wash. 90, 134 Pac. 695, we held:

“It seems clear that our statutory certiorari and review proceeding contemplates a review in the courts of the proceeding had in an inferior tribunal only upon the record of such proceeding made therein, and that such review is in no sense a trial *de novo* of the questions determined by the inferior tribunal sought to be reviewed.”

It is apparent, therefore, that the court could not review the action of the commissioner because the facts upon which his judgment was based had not been brought to the court, and it appearing that it was impossible to do this, the court could make no other order than one of dismissal; for it is made the duty of the superior judge in a certiorari proceeding depending upon facts alone, to review evidence and ascertain for himself the preponderance of the proof. He cannot do this without the record. It is contended, however, by counsel for the commissioner, that the findings of the commissioner must be taken, in the absence of the evidence, as the verdict of a jury, and that they are sufficient to sustain his judgment. The answer to this is that the statute has provided for a review of the facts by the court in cases of this kind. It is a special proceeding defined by statute and is not controlled by the rules of the common law or by the code of civil procedure.

It is suggested by the *Attorney General* that the commissioner is not confined in his determination to any evidence taken at a hearing; that he can make his finding irrespective of the evidence or by an independent investigation and that, having once decided that a deed shall be canceled, his order must be held to be conclusive.

This question is not before us on the record. The commissioner did take testimony and has made his finding upon the evidence. Nor will we inquire into the power of the commissioner to subpoena witnesses or to take the evidence of witnesses, or to administer oaths in a proceeding instituted to cancel a deed executed under chapter 16, title LI. However, in passing, it seems not out of place to say that the record shows a formal hearing before the commissioner, and that he did administer oaths to the witnesses. It has been the practice of that department, of which we now take judicial notice (16 Cyc. 908), to administer oaths in all hearings pertaining to state lands. We deem it not out of place to say that we have no doubt of the power of the commissioner to receive the sworn testimony of the witnesses, and if he has not that power by the implications arising out of the act, the oath might be administered by any other officer authorized to administer oaths in any judicial inquiry or proceeding under the laws of the state of Washington.

The court ordered that the proceeding be dismissed without prejudice. No appeal was taken from this part of the order. To make the judgment of the lower court effectual, it will be necessary to remand the case with directions to the trial judge to make an order vacating the decision of the commissioner, without prejudice to another hearing before the commissioner.

CROW, C. J., GOSE, MORRIS, and PARKER, JJ., concur.

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Opinion Per PARKER, J.

[No. 12040. Department One. December 30, 1914.]

GEORGE SECOR, *Respondent*, v. ED. CLOSE, *as Sheriff etc. et al.*, *Appellants*.¹

SALES—CONDITIONAL SALES—FAILURE TO FILE—STATUS OF CREDITORS—PREFERENCE. The failure to file in the auditor's office a conditional sales contract within ten days, whereby the sale became absolute as to subsequent creditors in good faith, under Rem. & Bal. Code, § 3670, does not prevent the vendees from returning the mill to the vendor as a preferred creditor, in payment of the balance of the purchase price, as against subsequent creditors who had no lien upon the mill or claims reduced to judgment, the value of the mill at the time of the preference not being disproportionate to the debt due.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered February 24, 1914, upon findings in favor of the plaintiff, in an action of claim and delivery for property levied upon, after a trial to the court. Affirmed.

B. L. Hubbell, for appellants.

Magill, McKenney & Brush, for respondent.

PARKER, J.—The plaintiff, George Secor, claims title to personal property levied upon by the sheriff of Cowlitz county, at the instance of the defendant John Gadbow, under an execution upon a judgment rendered in his favor against A. C. Luther and W. B. Mitchell, copartners. The plaintiff's claim was made, and trial had in the superior court, in pursuance of Rem. & Bal. Code, §§ 573-577 (P. C. 81 §§ 891-899), relating to adverse claims to property levied upon. Findings and judgment being rendered in favor of the plaintiff, establishing his title to the property and annulling the levy, the defendants have appealed therefrom to this court.

On May 14, 1912, respondent was the owner of a shingle mill, in Cowlitz county. On that day he entered into a con-

¹Reported in 145 Pac. 56.

tract of conditional sale of the mill to Luther and Mitchell, and delivered to them possession thereof; the condition of the sale being that the title to the mill should remain in respondent until full payment of the purchase price. Respondent failed to cause the contract of conditional sale to be filed in the office of the county auditor within ten days, or at all, after delivering possession of the mill to Luther and Mitchell, and thereby the sale became absolute as to subsequent creditors in good faith, under the provisions of Rem. & Bal. Code, § 3670 (P. C. 349 § 35). Thereafter, on July 2, 1913, Luther and Mitchell surrendered possession of the mill to respondent and all claim of title thereto, in full payment of the balance due upon the purchase price, only a small portion of which had theretofore been paid. It is not contended that the mill, after its use by Luther and Mitchell for a period of over a year after receiving possession thereof from respondent, was of greater value than the balance due upon the purchase price.

Over six months thereafter, on January 18, 1914, appellant Gadbow obtained a judgment against Luther and Mitchell for the sum of \$373, in the superior court for Cowlitz county. In that case, effort was made by appellant Gadbow to have his claim decreed to be a lien upon the mill including respondent's interest therein. This claimed relief was, however, denied by the court, and the action dismissed as to respondent, who had been made a defendant therein. That adjudication touching appellant Gadbow's claimed rights as against respondent remains in force and unappealed from. Contentions are made by counsel for appellants that the trial court erred in finding, as it did, in substance, that the mill was surrendered by Luther and Mitchell to respondent in payment of the balance due upon the purchase price thereof. A review of the evidence to which our attention has been called by the abstract convinces us that the evidence clearly preponderates in favor of the view of the trial court

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on this question. Other facts of the case are undisputed, as above summarized.

But little is necessary to be said touching the law of the case. Some contention is made by counsel for appellants, seemingly rested upon the theory that appellant Gadbow's rights have been secured, as he claims them here, by the failure of respondent to file in the office of the county auditor the conditional sale contract, and by Gadbow becoming a subsequent creditor in good faith of Luther and Mitchell. We are quite unable to see that these facts are of any avail to appellants here. These facts show nothing more than that the sale of the mill to Luther and Mitchell became, in law, an absolute instead of a conditional one, as to subsequent creditors in good faith. But this did not prevent Luther and Mitchell returning the mill to respondent in payment of the balance due upon the purchase price thereof, even though they thereby preferred respondent as a creditor, in the absence of the value of the mill at that time being in excess of the balance due upon the purchase price, or some other element of bad faith or fraud entering into the transaction. This is not an insolvency or bankruptcy proceeding, wherein might be sought the setting aside of this settlement of Luther and Mitchell debt to respondent, if prosecuted with due diligence. Appellant Gadbow was a mere creditor of Luther and Mitchell at the time of their surrender of the mill to respondent in payment of the balance due upon the purchase price. He has no lien upon the mill nor did he even have his claim reduced to judgment against Luther and Mitchell until more than six months after the surrender of the mill by them to respondent in payment of their debt. This preference payment of their debt was not unlawful to the extent that it can be ignored in the sole interest of appellant Gadbow, who was not a lien creditor at the time of the preference, whatever might have been done in an insolvency or bankruptcy proceeding timely prosecuted in the interest of all the creditors

of Luther and Mitchell looking to the setting aside of the preference.

The judgment is affirmed.

Crow, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 12184. Department Two. December 30, 1914.]

F. D. METZGER, *Respondent*, v. A. SIGALL *et al.*, *Appellants*.¹

BILLS AND NOTES—EXECUTION—EVIDENCE—SUFFICIENCY. The evidence is sufficient to establish that defendants signed certain notes, where they admitted the genuineness of their signatures, and the notes were filled out from standard printed forms in common use, with no evidence of irregularities, and the defendants were professional and business men of experience.

SAME—WANT OF CONSIDERATION—ACCOMMODATION MAKERS—BONA FIDE PURCHASERS. The fact that makers of notes received no consideration, does not affect their liability, as they would be accommodation makers, under Rem. & Bal. Code, § 3420.

SAME—HOLDER FOR VALUE. The payee of a note accepting the same as evidence of an actual loan of money made for her by an indorser, who guaranteed payment, is a holder for value as against accommodation makers claiming no consideration.

SAME—TRANSFER—ASSIGNMENT FOR COLLECTION. A holder for value may transfer title to notes by assignment for the purposes of collection.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered November 18, 1913, upon findings in favor of the plaintiffs, in consolidated actions upon promissory notes, tried to the court. Affirmed.

Jas. J. Anderson, for appellants.

Hayden & Langhorne, for respondent.

FULLERTON, J.—Sometime prior to the year 1909, one Mary E. Theisz, a resident of the state of Oregon, advanced to E. D. Wilcox, a resident of this state, certain moneys to

¹Reported in 145 Pac. 72.

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be loaned on real estate security. A loan of \$1,500 was made to a person by the name of Huston, who subsequently paid to Wilcox \$500 on the principal of the loan and \$120 interest. Wilcox then informed Mrs. Theisz that he had an opportunity to make another real estate loan for \$1,000 and would make the loan for her if she would forward him money enough to make up the difference between the money he had on hand and the amount required to complete the loan. She forwarded him the difference, whereupon he informed her that the opportunity to make the anticipated loan was gone, but that he could loan the money, if she wished him to do so, upon unsecured notes. She assented to the latter proposition, and shortly thereafter he forwarded her two notes, the one for \$600 dated Nov. 25, 1909, due one year from date, signed by A. Sigall as maker, and the other for \$400, dated January 28, 1910, due on November 25, 1910, signed by Wesley Lloyd as maker. On each of the notes, Wilcox placed his own endorsement, guaranteeing the payment of the note at maturity. Later on, Mr. Wilcox reported a collection on account of the first note of \$24, and on the second note of \$16, which sums were credited on the respective notes by Mrs. Theisz under the dates of June 2, 1910, and July 28, 1910. The notes were not paid at maturity, and later on Mrs. Theisz assigned them to the respondent in this action for collection.

On August 22, 1913, the assignee of the notes began separate actions in the superior court of Pierce county against the makers of the notes, and Wilcox as guarantor, to enforce collection of the same. Wilcox made default in each of the actions, although personally served with summons. Sigall answered the complaint, denying the execution of the note, and alleging affirmatively, that if the note was in fact signed by him, his signature was procured by Wilcox while acting as the agent of the appellant, by misrepresentation and deception, and without knowledge on his part of the nature and character of the instrument, and without any consideration passing to him for signing the same. Lloyd's answer was of

similar purport. Replies were filed, denying the affirmative matter set forth in the answers, after which the actions were consolidated for trial, and were heard by the court sitting without a jury. Judgment went in favor of the plaintiff, and the makers of the notes appeal.

At the trial, the genuineness of the signatures to the notes was admitted by the defendants. Each testified, however, that he had no recollection of the circumstances surrounding the execution of the notes, or knowledge of the manner by which his signature thereto was obtained, but each was confident that he did not sign it with knowledge of the character of the instrument, and that he had received no consideration for its execution.

But notwithstanding the somewhat positive character of this testimony, we are inclined to the opinion that the court's judgment was right on the facts. There was no attempt to prove the allegations in the answers to the effect that the signatures were procured by misrepresentation or deception, further than misrepresentation and deception can be inferred from the testimony recited. The instruments are, in themselves, strong witnesses against the appellants' claim that they signed them without knowledge of their character. The notes were filled out from standard printed forms in common use generally throughout the state. The printed matter is in black ink upon a green colored background, making them unusually conspicuous. There were three parallel lines for signatures on each of the notes, all upon the green background. The signatures are upon the upper line, the one closest to the printed matter. One of the notes was filled out with a typewriter and the other with a pen, and neither bear any evidences of irregularities such as are usually found in instruments instigated in fraud. In the light of these circumstances, it would seem almost unbelievable that the most unsophisticated person could have been deceived. And yet the makers of these notes were men of ripe and mature experience. One of them was a lawyer, having a practice ex-

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tending over a period of years, and the other a successful business man in the prime of life. The chance that either of them could be induced to sign any form of obligation without knowledge of its character is exceedingly remote, and that they could be induced to sign a promissory note of the character of the notes shown in evidence without such knowledge is more so. At any rate, the proofs that they were deceived must be cogent and convincing, and there is no such proof in the record before us.

The testimony of the appellants to the effect that they received no consideration for the execution of the notes, is not, if taken as true, fatal to the validity of the notes. They could be accommodation makers. By § 29, Laws 1899, p. 346 of the negotiable instruments act (Rem. & Bal. Code, § 3420), an accommodation maker is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; and every such a person is declared by the same section to be liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation maker. By § 26 (Id., § 3417), it is provided that, where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who become such prior to that time. We think, therefore, notwithstanding the appellants' contentions to the contrary, the evidence shows that Mrs. Theisz was a holder of these notes for value. She accepted them as evidences of an actual loan of her money made by Wilcox, and in her subsequent settlement with Wilcox, credited them in her account with him at their face value. Being a holder for value, she could, of course, transfer her interests unimpaired to the respondent, even though the transfer be only for the purposes of collection. Negotiable Instruments Act, Laws 1899, pp. 347, 348, 351, §§ 33, 37, 58 (Rem. & Bal. Code, §§ 3424, 3428, 3449; P. C. 357 §§ 65,

78, 115); *State ex rel. Adjustment Co. v. Superior Court*, 67 Wash. 355, 121 Pac. 847.

It would seem, moreover, that the testimony of the appellants with reference to the execution of the notes was hardly consistent. If it be true that they have no recollection of the circumstances surrounding the execution of the notes, it would hardly seem possible that they would remember that they signed them without an understanding of their character. On the part of Sigall, furthermore, there is evidence that he had at one time a different view of his liability from that expressed at the trial. It was shown that, at a time prior to the commencement of the action, he wrote to an attorney holding the note for collection as follows: "This will inform you that I saw my note at the bank in Tacoma yesterday and I admit that it is my signature, but I could not find Mr. Wilcox to talk the matter over. As it is so long back and I have to talk it over with Mr. Wilcox, as I thought he had paid the note long ago. However, you can assure Mrs. Theisz my note will be paid, if she will give me time, as I have quite a few documents like hers to pay." Surely he did not have, at the time this was written, the idea that he had signed the note without an understanding of its character.

It is probable, and we think the evidence fairly justifies the conclusion, that the notes were signed by the appellants as makers, as an accommodation to Wilcox, without their receiving value therefor, and with the expectation and belief that Wilcox would pay them when due. But their liability to the payee is none the less because of these facts, and the court rightly held them as bound.

The judgment will stand affirmed.

Crow, C. J., MOUNT, MAIN, and ELLIS, JJ., concur.

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[No. 12194. Department Two. December 30, 1914.]

VERNA L. COOPER, *Respondent*, v. WILLIAM COOPER,
Appellant.¹

JUDGMENT—VACATION—"PROCEEDINGS"—TRIAL—CHANGE OF VENUE—BIAS OF JUDGE. Under Rem. & Bal. Code, §§ 467, 468, providing that proceedings to vacate or modify a judgment for fraud in obtaining it shall be by verified petition, with process, pleadings and issues made up in the same way as in an original action, an application to modify a judgment is a new and independent proceeding within the purview of 3 Rem. & Bal. Code, §§ 209-1, 209-2, providing for a change of judges for bias in any action or "proceeding."

VENUE—CHANGE—BIAS OF JUDGE—TIME FOR APPLICATION. A motion for a change of judges on account of bias of the judge is timely, where it was made as soon as the cause had been assigned under the rules of court by the presiding judge to a judge of a particular department for trial, although it had been previously assigned for trial on a day certain without designating any department or judge.

DIVORCE—DECREE—MODIFICATION—JURISDICTION. In divorce, the jurisdiction is continuing, especially where the interests of children are concerned, and the decree may be modified without the necessity for new process.

Appeal from an order of the superior court for King county, Humphries, J., entered April 4, 1914, dismissing a petition to vacate a decree of divorce, on the ground of the insufficiency of the petition. Reversed.

Walter S. Fulton, Charles F. Riddell, and Edwin C. Ewing,
for appellant.

Paul B. Phillips, for respondent.

ELLIS, J.—This is an appeal from an order dismissing a petition to vacate a decree of divorce. The original action was commenced in the superior court of King county on April 28, 1913, by the respondent here, as plaintiff, against the appellant here as defendant. The issues were made up, and the cause was finally called for trial July 3, 1913. It

¹Reported in 145 Pac. 66.

was tried before Honorable John E. Humphries, one of the judges of the superior court of King county, who entered a decree granting an absolute divorce to the plaintiff in the original action, respondent here, awarding her the care and custody of the two minor children, giving her as her sole and separate property certain real estate, including the home and furniture belonging to the parties, and ordering the defendant in that action, appellant here, to pay to the plaintiff for the support of herself and the children the sum of \$35 a month.

On August 7, 1913, the defendant in that action, appellant here, began a proceeding by petition under chap. 17, §§ 464 to 473, inclusive, of Rem. & Bal. Code (P. C. 81 §§ 1163-1175), for the vacation of the decree of divorce on the ground of fraud practiced by the successful party in obtaining it. This proceeding was commenced by service of a copy of the petition and service of notice in the nature of a summons, as required by the provisions of the above mentioned statute, and the filing of the petition. In order to avoid confusion, the parties will be designated as appellant and respondent. The case was noticed for assignment for trial, noted in the usual manner, and came on regularly to be set for trial on a day certain, on February 7, 1914. During the interval since the filing of this petition, the rules of the superior court of King county were so changed as to provide for a presiding judge whose duty it was, among other things, to assign each day all cases set for trial to the various departments of the court. The judge of department 1, Honorable A. W. Frater, was presiding judge; and on February 7, 1914, when this case was called, he set it for trial on February 26, 1914, but did not, so far as the record shows, assign it to any department or judge. On February 27, 1914, the case was called and assigned to department No. 4, Honorable John E. Humphries, judge, for trial. Immediately upon this assignment for trial, the appellant filed in department No. 1, the department of the presiding judge, his mo-

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tion and affidavit for a change of judge for prejudice, under the act of 1911, 3 Rem. & Bal. Code, § 209-1. The motion came on for hearing on March 2, 1914, and on that date, after argument, was overruled by the presiding judge and a formal order to that effect was entered under date of March 3, 1914. The trial upon the appellant's petition was then had in department No. 4, before Judge Humphries, who ruled that the petition stated no facts sufficient to invoke any relief and dismissed the proceeding. This appeal followed.

Three questions are discussed in the briefs. (1) Was the proceeding by petition to vacate the decree of divorce a proceeding within the contemplation of the statute providing for a change of judge for prejudice? (2) If so, was the application for the change made in time? (3) Did the petition, in any event, state sufficient grounds to entitle the appellant to any relief?

It is obvious that, if the first two questions be answered in the affirmative, it will be neither necessary nor proper for us to consider the third question. That is a matter which can only come to us by an appeal from the decision of a qualified trial court. This is not a court of first instance.

The act under which this proceeding was instituted, taken as a whole, contemplates two distinct forms of procedure. Section 466 clearly contemplates an application for relief against the judgment attacked, for certain causes therein enumerated. That proceeding is by motion. No specific form of notice is mentioned. The proceeding here was not taken under that section. The pertinent provisions under which this proceeding was instituted (quoting Rem. & Bal. Code by section number), are as follows:

“§ 464. The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term (time) at which such judgment or order was made, to vacate or modify such judgment or order: . . .

“4. For fraud practiced by the successful party in obtaining the judgment or order; . . .”

"§ 467. The proceedings to obtain the benefit of subdivisions . . . four, . . . of section 464 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; . . ."

"§ 468. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried." (P. C. 81 §§ 1168, 1169, 1171.)

It will be noted that this proceeding by petition is, in its nature, a new and independent proceeding, in which the adverse party is brought into court as upon original process by service of a notice in the nature of a summons as in an original action. Clearly this proceeding by petition is intended as a statutory substitute for a bill in equity to set aside a judgment for certain causes, if brought within the year after its rendition. For every practical purpose, such a proceeding is, in its nature, a new and independent proceeding involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action. In the case of *Roberts v. Shelton Southwestern R. Co.*, 21 Wash. 427, 58 Pac. 576, in discussing the nature of this proceeding, after reciting the statutory provisions, this court said:

"This chapter of the statute, taken as a whole, plainly imports that the petitioner in proceedings of this character is deemed the plaintiff and the adverse party the defendant. In other words, the proceeding to vacate or modify a judgment is in the nature of an independent action."

It seems to us that a proceeding which is instituted with all the formality of an original action and conducted through-

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out in the same manner as an original action and in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against a judgment, is, in its very nature, a new proceeding, and hence falls within the purview of the act of 1911 relating to the disqualification of judges of the superior court, for prejudice. That act, so far as here material, 3 Rem. & Bal. Code, §§ 209-1, 209-2, is as follows:

“No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; . . .”

“Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: . . .”

It is a universal rule of statutory construction that a statute will be construed so as to give effect to all of the words used therein unless such a construction would produce a manifest absurdity. The use of the words, “any action or proceeding” in both of the above quoted sections indicates the clear intention on the part of the legislature that, by timely motion and affidavit, a litigant shall be entitled to a change of judge for prejudice not only in an original action, but in any proceeding in the nature of an action. Any other view would convict the legislature without reason, of using the word “proceeding” to no purpose. The respondent urges that this statute should be liberally construed in favor

of jurisdiction as in case of the statute touching venue, citing *Carr v. Remele*, 74 Wash. 380, 133 Pac. 593. The rule there announced, though a wholesome one when soundly applied, would not warrant the judicial repeal of the statute here in question nor the cancellation of any of its terms. Our recent decision in *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291, is clear authority for the view that any proceeding commenced by new and independent process, though arising out of and connected with another action, is a proceeding within the meaning of the act of 1911.

We are also clearly of the opinion that the application for change of judge was made in time. The respondent urges that the appellant, having filed his petition in the original action on the 7th of August, 1913, and having made no application for a change of judge until February 27, 1914, his application came too late. It will be noted, however, that the petition took its regular course under the rules of the superior court for King county, and was not assigned to any particular department or judge for hearing until February 27, 1914. Under the court rule, it is manifest that the appellant could not know to what judge the matter would be assigned until the assignment was made. His immediate application for the change was therefore timely. Any other view would be unreasonable and deprive the appellant of his clear statutory right. We conclude that the presiding judge committed error in refusing the application.

We have often held that the jurisdiction of the trial court in divorce cases is a continuing jurisdiction, especially where the interests of minor children are concerned, and that the trial court, in the exercise of its equitable powers, may, from time to time, upon proper application, change or modify its decree touching alimony and support money and the custody of the children. *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Kane v. Müller*, 40 Wash. 125, 82 Pac. 177; *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118

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Pac. 634; *Beers v. Beers*, 74 Wash. 458, 133 Pac. 605; *State ex rel. Jones v. Superior Court*, 78 Wash. 372, 139 Pac. 42. In such a proceeding, no new process is necessary. *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673. What we have said in this case is not intended to apply to such cases. This being a statutory proceeding, the case here is clearly distinguishable from the foregoing cases and also from the case of *State ex rel. Stevens v. Superior Court*, 82 Wash. 420, 144 Pac. 539.

The judgment is reversed, and the cause remanded with directions to grant the motion for a change of judge, and for further proceeding.

CROW, C. J., FULLERTON, MAIN, and MOUNT, JJ., concur

[No. 12241. Department One. December 30, 1914.]

THE STATE OF WASHINGTON, *on the Relation of C. E. Gilmur*,
Appellant, v. THE CITY OF SEATTLE *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL—CIVIL SERVICE—ABOLITION OF OFFICE—GOOD FAITH. An officer in the civil service of a city cannot be removed from office by an ordinance abolishing the office for the sole purpose of getting rid of the man, and immediately recreating the office and appointing another to the position; and repeated attempts to do this, after being enjoined from removing the officer, and while the duties of the office still exist and are performed by others, shows the bad faith of the city.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 14, 1914, dismissing mandamus proceedings to restore a city official to office, after a trial to the court. Reversed.

Preston & Thorgrimson, for appellant.

James E. Bradford and *William B. Allison*, for respondents.

¹Reported in 145 Pac. 61.

MORRIS, J.—Subsequently to our decision in *Gilmur v. Seattle*, 69 Wash. 289, 124 Pac. 919, in which a decree enjoining Gilmur's removal from the office of foreman of outside construction in the lighting department of the city of Seattle was sustained, and with the evident purpose of circumventing the effect of that decision, the city passed an ordinance abolishing the position, and at the same time passed another ordinance recreating the same position, the latter ordinance to become effective immediately upon the going into effect of the ordinance abolishing the position. Gilmur thereupon commenced a second proceeding to prevent his removal, and the city was again enjoined from removing him from office. In furtherance of its evident design, the city, through its legislative department, again abolished the position filled by Gilmur and, on September 15, 1912, the day such last ordinance went into effect, Gilmur was notified that his services were no longer required. Gilmur subsequently sued out this writ of mandamus, seeking reinstatement and for a direction to the proper officials of the city to deliver to him warrants upon the general fund of the city for the amount of his salary up to the time of his reinstatement. The judgment of the lower court was adverse to Gilmur, and, it having so announced, the city again indicated the motive actuating it in this matter by passing another ordinance recreating the position that had been occupied by Gilmur. Nothing more need be said as to what the city was seeking to accomplish in all this maneuvering. It is too apparent to require discussion that, for some reason, the purpose was to abolish, not the position, but the incumbent. The position was created and filled under civil service regulation, and, as evidencing that it sought to get rid of the man but retain the office, it is shown that, during all this time, the duties of the office remained, and in order to properly carry on the work of the department, it was necessary for the head of the department to assign to this work men in the different classifications of the civil service but who, under the civil service

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regulations, were not qualified. The work, however, remained and must be performed by some one. It is also shown that Gilmur has made repeated attempts to obtain permission to fill the position, and has at all times held himself ready and willing to act when called upon.

The purpose of the statutes creating and regulating civil service is to insure the continuance in public employment of faithful and competent officials without subjecting them to the vicissitudes of political strife. Statutes of this character are not intended to, nor do they, abridge the power of the city to abolish an office when its duties have ceased to exist, or to do any other act for the better or more economical administration of the city's affairs, when influenced by good motives and justifiable ends. *State ex rel. Voris v. Seattle*, 74 Wash. 199, 133 Pac. 11; 2 Dillon, Municipal Corporations, § 479. To abolish an office, with the sole purpose of getting rid of the man but not the office, is not an act of good faith, and to permit it would make civil service a farce. Having this in mind, it has been uniformly held that municipal authorities cannot obtain the sanction of the courts in seeking to exercise such a power. *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197; *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963; *State ex rel. Cole v. Coates*, 74 Wash. 35, 132 Pac. 727; *People ex rel. Hart v. La Grange*, 7 App. Div. 311, 40 N. Y. Supp. 1026; *Ingram v. Board of Street & Water Com'rs of Jersey City*, 63 N. J. L. 542, 43 Atl. 445; *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410; *Silvey v. Boyle*, 20 Utah 205, 57 Pac. 880; *Sutherland v. Board of Street & Water Com'rs of Jersey City*, 61 N. J. L. 436, 39 Atl. 710.

The judgment is reversed.

Crow, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 12127. Department One. December 30, 1914.]

THE CITY OF SEATTLE, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY *et al.*, *Appellants*.¹

EMINENT DOMAIN—PROCEEDINGS—NECESSARY PARTIES DEFENDANT. In proceedings by a city to condemn the property of a railroad company, which was in the hands of receivers, the receivers are necessary parties defendant.

SAME—PROCEEDINGS—LIMITATION OF USE—ISSUES AND PROOF—DAMAGES—DECREE. In proceedings by a city to condemn part of the right of way of a railroad company in order to secure a joint use, in which verdicts for damages were awarded for such joint use only, judgment cannot be entered granting to the city the fee of the property condemned.

SAME—ASSESSING DAMAGES—SEPARATE TRIALS AS TO SEPARATE TRACTS. In proceedings by a city to condemn part of the right of way of a railroad company for a distance of several miles, but of varying widths, described by metes and bounds by various descriptions, dividing the property into various zones, the city is not entitled to try out the issue of damages on each description or zone, and have various verdicts rendered thereon, but the damages must be determined as a whole, and not by piecemeal; and it is immaterial that as to some of the zones it is claimed that the city's rights are determined by deeds, franchises, and prior litigation; since the questions of such rights and title are not to be submitted to the jury.

SAME—DAMAGES—MEASURE OF DAMAGES. Upon the condemnation of railway property, in determining the damages because of a five per cent grade adjacent to its terminal and shops, the measure of damages is such sum as would enable the railway company to readjust itself to the new grade, so that it would occupy the same relative position to the proposed grade as it does to the present grade; and not the amount necessary to readjust the tracks into the shops on a five per cent grade, the cost of retaining walls, and estimated insurance against added risks of operation on a five per cent grade.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 27, 1914, upon the verdict of a jury rendered in favor of the defendant, in proceedings to condemn lands for street purposes. Reversed.

¹Reported in 145 Pac. 54; 1167.

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Scott Calhoun, for appellants.

James E. Bradford and *Howard M. Findley*, for respondent.

MORRIS, J.—Action by the city of Seattle, seeking condemnation of adjacent property for the purpose of widening Rainier avenue. Included in the property affected, was the right of way of the railway company, varying in width from sixteen to thirty-three feet throughout the entire distance of about eight miles, and tract 30, Morningside addition, upon which the railway company had erected its shops and car barns. The railway company has appealed, alleging numerous errors.

First, it is contended that, under the authority of *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277, the receivers of the railway company should have been made parties. This contention must be sustained. The city suggests that, because of a different showing as to certain dates relative to the action of the Federal and state courts in the appointment and discharge of receivers, the *Peabody* case is not controlling. It seems to us, however, that the same reasoning is present here as in that case, and that no valid decree could be made without the presence of the receivers.

The condemnation ordinance referred to the property of the railway company to be taken or damaged, as all right, title, and interest in and to any lands lying within the limits of Rainier avenue, belonging to the Seattle, Renton & Southern Railway Company. The petition adopted the same language, describing the right of way with its varying widths by metes and bounds, and embracing a number of different descriptions, some of which would describe but a small portion of the right of way, while others would describe long distances. The city was permitted by the lower court to try each one of these descriptions separately, upon the theory that the city was not condemning the whole title or interest

of the railway company, but only the right to make a joint use for street purposes, which would not interfere with the use of the railway company. The jury in each instance assessed the damages to be awarded for such joint use at the sum of ten dollars, irrespective of either the length or width of the right of way embraced in that particular description. Judgment was entered upon these various verdicts, the language of which under Rem. & Bal. Code, § 7784 (P. C. 171 § 63), would vest the title to these various descriptions in the city in fee.

There is nothing equitable in ascertaining the damages to be awarded upon the theory of a joint use, and then entering a decree that grants the entire use. Such procedure cannot be sustained. As was said in *State ex rel. Union Lumber Co. v. Superior Court*, 70 Wash. 540, 127 Pac. 109:

"The law is well settled in this state that, where the right of eminent domain is given, that right may be exercised in a stipulated manner, and that the court may in its decree provide for a limited use, or a particular use, which shall recognize the rights of both parties in the use of the land appropriated; and that the jury, in determining the compensation to be paid, shall do so with reference to the particular use to which the lands are to be put and the particular method sought to be adopted in the taking and use of the lands sought to be appropriated. These and like rules have been laid down in, *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940. If then, a particular use or right may be condemned, we can see no objection to the decree of appropriation definitely determining and adjudicating the particular use to which the lands are to be put and the particular manner in which the right sought is to be exercised. This has ordinarily been done by stipulation, or some appropriate method employed at the time of the trial to ascertain the damages."

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If the city, therefore, seeks to take less than the whole, then its purpose should in some way be clearly indicated, so that the judgment of condemnation will be a final and absolute determination of the rights of the parties, and these rights should be ascertained as a whole and not piecemeal. If it is the purpose of the city to obtain a joint use of the railway property for city purposes, the damages, if any, should be determined from such joint use of the whole right of way, and not by dividing such right of way into zones and determining each separately as if it were the only use to be determined. The vice of such a procedure is shown in the several verdicts returned in this case, wherein a uniform sum of ten dollars is determined to be the damages, irrespective of the length or width of the right of way included in that zone. Manifestly, if such a sum is a just estimate of the damage to be awarded for a joint use of the smallest zone measured by feet, a like sum would seem inadequate for such a use of the largest zone measured by miles, irrespective of the varying widths. Answering this suggestion, the city contends that the railway interest in its right of way is determined by various deeds, franchises, etc., and that prior litigation has fixed the rights of the respective parties as to some of these varying zones. In so far as the railway company's rights are determined by various deeds or franchises, we do not think it in any way detracts from its right to have the damages for the city's right of joint user determined as a single right and in one verdict. In so far as the rights of the parties have been determined by prior litigation, it would seem as though the city should determine its rights as fixed by such litigation, and not subject them to the determination of the jury in this case as influencing the amount of damages to be awarded. This is, in effect, subjecting the title as between the city and the railway company to the jury, which does not seem to us to be proper in this proceeding.

Appellant suggests a serious question, as to whether or not the city can condemn the longitudinal right of way of the street railway so as to deprive the railway company of its use. But, inasmuch as it would seem to be the purpose of the city to condemn only a joint use, we will not now undertake to determine the question submitted by the suggestion.

In determining the damage to the railway company because of a five per cent change of grade in the avenue adjacent to the property occupied as shops and car barns, the city was permitted to proceed upon the theory that the measure of damage was the amount necessary to readjust the tracks from the main line into the shops and barns on a five per cent grade and the cost of a concrete retaining wall along the property line, together with an amount estimated to be sufficient as an insurance against the added risk of operation upon a five per cent grade. This amount was estimated by the city's witness as \$2,156, which was the sum fixed by the jury in its verdict, showing the adoption of this theory. This measure of damages is incorrect. The true measure of damages is such a sum as would enable the railway company to readjust itself to the new grade so that it would occupy the same relative position to the proposed grade as it does to the present grade. The court so instructed the jury in one instance, but added that they might return a verdict in such a sum as would enable the railway company to readjust its tracks and plant to the proposed grade, together with the added cost of operation. This, in effect, permitted the jury to determine the proper measure of damage and to return a verdict accordingly.

Numerous other errors are suggested, but we have said enough to establish reversible error, and the other assignments will not be referred to.

The judgment is reversed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

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Opinion Per Curiam.

ON REHEARING.

[Decided February 5, 1915.]

PER CURIAM.—The respondent has filed a motion for a modification of the opinion heretofore filed herein, in which the conclusion was reached that the judgment appealed from should be reversed. As appears from the first opinion, this was a condemnation case brought by the city in which it was sought to condemn adjacent property for the purpose of widening Rainier avenue. The improvement affected more than 1,200 distinct pieces of property, and 3,500 parties respondent, upon which 1,417 verdicts were entered, but only one judgment. From this judgment the railway company only appealed. We think it is evident from a reading of the first opinion that the order of the court as to the reversal of the judgment was to affect the railway company only, and not disturb the judgment as to the other parties who took no appeal; but inasmuch as the judgment affects so many distinct pieces of property, we have concluded, in the interest of certainty, to modify the original opinion so that the same will read in the last line thereof: "The judgment is reversed only as to the appellant Seattle, Renton & Southern Railway Company."

[No. 12497. Department Two. December 31, 1914.]

THE STATE OF WASHINGTON, *on the Relation of John F. Murphy, as Prosecuting Attorney, Plaintiff*, v. J. J. BROWN, *Respondent*.¹

ARREST—RIGHT OF SEARCH—RETENTION OF EFFECTS FOR PURPOSE OF SEARCH. Where, upon the arrest of a person charged with an attempt at bribery, a demand was made upon him for \$1,000 then on his person, which had been offered as a bribe, together with all papers bearing on the case, to be used as evidence in the case, which the prisoner thereupon turned over to the prosecuting attorney, stating in substance "I suppose you have the right to," the demand was within the rights of the officer to search for and retain either goods or money connected with the crime or supplying proofs relating thereto, and where the moneys and papers appear to have been voluntarily surrendered, it is error, on the prisoner's application to the court for a return of the same, to order the prosecuting attorney to make the return (MOUNT, J., dissenting).

Certiorari to review an order of the superior court for King county, Tallman, J., entered November 5, 1914, ordering the prosecuting attorney to return certain money and papers to an accused person, after a hearing on affidavits upon an order to show cause. Reversed.

John F. Murphy and *S. H. Steele*, for relator.

Tucker & Hyland, for respondent.

MAIN, J.—On the 29th day of October, 1914, the defendant, J. J. Brown, was charged by information with the crime of attempting to corruptly influence an agent. Thereafter, and on the 5th day of November, 1914, the defendant filed in the cause a petition, wherein he prayed that \$1,000 of money and certain papers then in the possession of the prosecuting attorney should be returned to him. Upon the presentation of this petition, an order to show cause was entered directing that the prosecuting attorney appear and show cause why he should not deliver the money and papers to the

¹Reported in 145 Pac. 69.

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Opinion Per MAIN, J.

defendant as prayed for in the petition. On the 11th day of November, 1914, the prosecuting attorney made his return to the order to show cause. Thereupon the defendant moved for judgment as prayed for in his petition. This motion was based upon the petition of the defendant, the order to show cause, and the return of the prosecuting attorney. The court granted the motion and entered an order directing that the \$1,000 and the papers be returned to the defendant. To review this order, the cause is brought here by certiorari.

To avoid confusion, the parties will be referred to as the defendant and the prosecuting attorney. The defendant in his petition alleged in substance: That he is a citizen of the Dominion of Canada; that, on the 15th day of October, 1914, he was sojourning in room 935, of the Frye hotel, in the city of Seattle, in King county, Washington; that, on this date, the prosecuting attorney in and for King county entered his room and stated to the defendant that he, the prosecuting attorney, had power and authority to arrest the defendant, although at the time the prosecuting attorney was without a warrant or authority to make such arrest; that the prosecuting attorney then commanded the defendant to go with him from his room to the office of the prosecuting attorney in the Alaska building in the city of Seattle; that, upon arriving at the office of the prosecuting attorney, he demanded that the defendant deliver to him \$1,000 in money, then upon the person of the defendant; that at the time the prosecuting attorney commanded the defendant to go with him from his room in the hotel to the office of the prosecuting attorney, the latter commanded and directed the defendant to bring with him all his personal belongings, including two leather grips and their contents, which contained, among other things, papers in the handwriting of the defendant; that, upon arriving at the office of the prosecuting attorney, before the issuance of a warrant, and before the filing of any complaint or information against the defendant, the prosecuting attorney demanded that the defendant surrender and

deliver to him the \$1,000, together with certain papers belonging to the defendant; that, before the surrender of the money and the papers to the prosecuting attorney, the defendant informed the prosecuting attorney that he desired to be represented by counsel, and that he desired to telephone his attorney; that the prosecuting attorney refused to permit the defendant to communicate with his counsel, and restrained him of his liberty from 12:30 o'clock p. m. until 3 o'clock p. m. of the day named, and that a complaint was not filed against the defendant until after the surrender of the \$1,000 and the papers; that the money and papers are unlawfully held by the prosecuting attorney; that the prosecuting attorney proposes to use the money and the papers at the trial of the above entitled cause.

Upon this petition, as above stated, a show-cause order was issued. The prosecuting attorney, in his return to the order to show cause, denies that, in room 935 in the Frye hotel on the 15th day of October, 1914, he stated to the defendant that as prosecuting officer of King county he had power and authority to arrest the defendant; admits that he requested the defendant to come with him from his room in the hotel to the prosecuting attorney's office in the Alaska building; admits that, after arriving at his office, he requested the defendant to deliver to him \$1,000 in money then upon the person of the defendant; admits that, after arriving at his office, he requested the defendant to deliver to him whatever papers were in his possession relative to the case under consideration; admits that he requested the defendant to bring his grips and papers from the Frye Hotel to the prosecuting attorney's office; admits that, after arriving at his office, he demanded of the defendant \$1,000 in money, and in addition thereto whatever papers and documents the defendant had in his custody and possession bearing upon the question then under investigation. The prosecuting attorney, in his return, denies that he refused to permit the defendant to telephone to his attorney; denies that the money

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and papers or any part thereof are being unlawfully or improperly held; admits that he does intend to use the money and papers as evidence on the trial of the cause filed against the defendant, and that he holds them for no other purpose than to be used as such evidence.

Further answering the order to show cause, the prosecuting attorney alleges: That on the 15th day of October, 1914, in addition to being the qualified and acting prosecuting attorney in King county, Washington, that he was a duly appointed, qualified, and acting deputy sheriff; that on the 14th day of October, 1914, complaint had been made to him that the defendant had violated and was continuing to violate § 426 of chapter 249 of the session laws of 1909 (Rem. & Bal. Code, § 2678); that, for the purpose of ascertaining the truth of the charge, the prosecuting attorney, on the 15th day of October, 1914, in company with others, was in an adjoining room in the Frye hotel to the room occupied by the defendant and that, at that time, there was therein one W. F. Heppenstahl, an employee of the William J. Burns International Detective Agency; that, at said time and place, the prosecuting attorney had in operation in said room of the defendant a dictograph; that the prosecuting attorney and others, by virtue of the dictograph, heard the defendant offer Heppenstahl \$1,000 as compensation, gratuity, and reward in consideration of the revelation and disclosure to the defendant by Heppenstahl of the name of the client of the William J. Burns Detective Agency who was paying the detective agency for investigation by it then proceeding in the Dominion of Canada; that, thereupon, the defendant instructed Heppenstahl to place the name upon a slip of paper and that he would place \$1,000 upon the bureau; that the defendant counted out the sum of \$1,000 in money; that, at this time, the prosecuting attorney knocked upon the door of room 935, occupied by the defendant under the name of J. J. Harris; that the door was opened and the prosecuting attorney then walked in and

informed the defendant that he was the state's attorney, and requested him to accompany him to his office; that J. J. Harris, as he was then known, requested the prosecuting attorney to identify himself, and for this purpose letters and other documents, including a deputy sheriff's commission, were exhibited; that the prosecuting attorney then believing that the defendant had violated § 426 of chapter 249 of the Laws of 1909, and had committed a crime, and desiring to obtain further evidence for use upon the trial against the defendant, requested the defendant to accompany him to his office and bring with him his books and papers referred to in the petition; that, after arriving at the prosecuting attorney's office, the defendant then stated to the prosecuting attorney that his true name was J. J. Brown and not J. J. Harris; that the prosecuting attorney then requested the defendant to pay him the \$1,000 and deliver to him the papers referred to in the petition, stating to the defendant at the time that he desired the money and papers for use as evidence on the trial of the charge which was to be filed against the defendant for attempted bribery; that, after making the request for the money and papers, the defendant stated, in substance, that "I suppose you have the right to," and thereupon delivered them over; that the defendant voluntarily for that purpose surrendered the money and papers to the prosecuting attorney, after having enclosed the money in an envelope and sealed it; that the prosecuting attorney, after receiving the money and papers, proceeded to prepare and file a complaint against the defendant, charging him with the violation of the statute, and caused a warrant to be issued and served upon the defendant, arresting him upon the charge; that subsequently the prosecuting attorney caused to be filed in the superior court of the state of Washington for King county an information against the defendant charging him with the crime mentioned in the statute; that, while the complaint was being prepared in the prosecuting attorney's office, the defendant asked if he was under

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arrest, to which it was replied that he was not up to that time, but that he was then placed under arrest; that immediately thereafter the defendant asked permission to telephone to his attorney, who was immediately called, and came to the prosecuting attorney's office; that the prosecuting attorney still has the \$1,000 in money, the letters and papers referred to in the defendant's petition, and is retaining them to be used as evidence on the trial of the information now pending in the superior court of the state of Washington.

As above noted, the superior court granted the motion, which was similar in its nature to that of a motion for judgment on the pleadings in a civil action. To sustain a judgment entered upon such a motion, all the allegations of the prosecuting attorney's return to the order to show cause must be taken as true. The defendant, in his petition, does not charge that the money and papers were surrendered by reason of force or duress, or even under protest. There is no statement, in either the petition or the return to the show cause order, which shows the nature or course of the conversation which took place between the defendant and the prosecuting attorney in the latter's office. According to the allegations in the return to the order to show cause, when the surrender of the money and papers was demanded by the prosecuting attorney, the defendant was informed that they were to be used as evidence upon the trial of a charge which was to be filed against him, and that the defendant voluntarily, with the statement "I suppose you have the right to," surrendered them. If the allegations in the prosecuting attorney's return are true, the money and papers were voluntarily surrendered by the defendant to the prosecuting attorney for the purpose of being used as evidence upon the trial of a charge which was to be filed.

The general rule is that, where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed crime,

and discoveries made in this lawful search may be shown at the trial in evidence. In Bishop's New Criminal Procedure § 211, the rule is stated thus:

"The arresting officer ought to consider the nature of the accusation; then if he finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs relating to the transaction, he may take and hold them to be disposed of as the court directs. And discoveries made in this lawful search may be shown at the trial in evidence; as, marks and scars on the prisoner's person; and if there are tracks supposed to be his, the officer may require him to put his feet into them, or to take off his boots to be compared with them, the result to appear in evidence at the trial."

In *Weeks v. United States*, 232 U. S. 383, 393, speaking upon the question of the right to search the person of one under legal arrest, it is said that such right has always been recognized under English and American law, and has been uniformly maintained in many cases. In the present case, if the allegations in the prosecuting attorney's return to the order to show cause are true, the defendant had not been placed under arrest at the time he surrendered the money and papers in question, but that they were voluntarily surrendered with full knowledge of the purposes for which they were to be used. If the papers and money were voluntarily surrendered, no right of the defendant was invaded. These facts would not bring the case within the rule of the cases cited in the brief, which directed the return of the property where it had been illegally taken from the defendant. That the money and papers would be material and relevant evidence upon the trial of the defendant upon the charge of attempted bribery does not seem to be controverted.

The defendant cites, and apparently relies upon as sustaining his right to the papers, the case of *Weeks v. United States*, *supra*. That case, however, is distinguishable from

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the present. There the question involved was the "right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises." From this excerpt, quoted from the opinion, it appears that the letters and correspondence there involved were seized in the house of the accused, not only without a warrant, but also without his authority. In the present case, the money and documents were surrendered to the prosecuting attorney voluntarily and therefore by the authority of the defendant after the latter had been advised of the purpose for which they were to be detained.

A number of other questions are discussed in the briefs, but the conclusion we have already reached renders a consideration of them unnecessary. It follows that the judgment must be reversed, and it is so ordered.

CROW, C. J., ELLIS, and FULLERTON, JJ., concur.

MOUNT, J. (dissenting).—It is not disputed that the money taken from the defendant is the property of the defendant. It is not clear that the money is necessary to be used as evidence upon the trial. But conceding that it may be useful and necessary as such evidence, the trial court, in its discretion, may control it and order it returned to the rightful owner, either before or after the trial. Such discretion will not be reviewed except for abuse. There is no abuse of discretion shown here. It seems to me, therefore, that the writ should be dismissed and the order affirmed.

I therefore dissent.

[No. 12536. Department Two. December 31, 1914.]

T. M. TENNENT, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—ORDINANCES—REQUISITES—PASSAGE—VALIDITY. The charter requirement of a city that an ordinance shall not be passed at the meeting at which it is introduced cannot be evaded by the subterfuge of first introducing what purported to be an ordinance, but which was without body or parts, and could only have been intended as the title to an ordinance subsequently to be written, and at the next meeting of the council introducing a completed ordinance with substantially the same title but containing various other matters not embraced within the title first introduced.

SAME—CONTRACTS—AUTHORITY—INVALID ORDINANCE. A contract deriving its sanction wholly from an ordinance of a city is invalid, where the charter prescribed that no ordinance should be passed at the same meeting at which it was introduced, and this provision was violated by the council.

SAME—BONDS—SUBMISSION TO VOTE—INVALID ORDINANCE—RATIFICATION. Where a city charter makes an ordinance an essential to the institution of proceedings to submit a bond issue to a vote of the people, and the ordinance submitting the matter is invalid, the bonds are not rendered valid by the fact that the incurrence of the indebtedness was approved by the electors of the city at the election subsequently held under such ordinance.

SAME—ORDINANCE—PASSAGE—VALIDITY—DETERMINATION BY COURTS. The courts are not deprived of their right to inquire into the manner in which city ordinances are introduced and passed, upon the principle that the enrolled bill is in itself conclusive evidence of regularity in its passage, as in the case of legislative acts; since the city is not one of the three coordinate branches of the government, but is only exercising delegated authority in a prescribed manner, and an authority must be exercised to see that the city performs its functions in such manner.

SAME—CONTROL OVER STREETS—STATUTORY PROVISIONS. An agreement with, or consent of, the Port of Seattle is not essential to an issue of bridge bonds by the city of Seattle for various bridges, on the theory that the Port of Seattle has some interest therein, under a provision of the city charter providing that when the electors shall have adopted a comprehensive plan or scheme of harbor or port improvement, the control of streets therein shall be vested in the Port

¹Reported in 145 Pac. 83.

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of Seattle within thirty days after it is prepared to proceed therewith; since the provision is not self-executing, and the Port's interest will not accrue until the comprehensive plan has been adopted.

SAME — BRIDGE BONDS — CONDITIONS PRECEDENT — ACQUISITION OF LANDS. The obtaining of property on which to place a city bridge is not a condition precedent to the issuance of bonds to procure funds for the construction of the bridge, and the validity of the bonds is not affected thereby, where it is not shown that there is any impediment preventing the city from ultimately obtaining the property.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 2, 1914, dismissing an action to restrain the issue of municipal bonds, after a trial to the court. Reversed.

Preston & Thorgrimson, for appellant.

James E. Bradford, Howard A. Hanson, and Geo. A. Meagher, for respondent.

FULLERTON, J.—The appellant, a citizen and taxpayer of the city of Seattle, brought this action against the city to restrain it from issuing and delivering certain negotiable bonds, purporting to have been authorized by ordinance of the city of Seattle, and by the vote of the electors of the city at a special election at which the question of the issuance of such bonds was submitted. The court below, after a trial of the issues made by the pleadings, adjudged the action unfounded, and ordered its dismissal. This appeal followed.

The principal question suggested by the appellant is the sufficiency of the proceedings of the city council leading up to the enactment of the ordinance. It is contended that such proceedings were so far irregular, and so far a departure from the requirements of the city charter relative to the enactment of ordinances of this character, as to render the ordinance void. To make clear the precise contention, the facts must be briefly recited. On May 8, 1914, at an adjourned session of the city council, a member thereof intro-

duced an instrument entitled, "Ordinance No.———," reading as follows:

"An Ordinance submitting to the qualified voters of the City of Seattle at a special election to be held in said city on the———day of———, 1914, the proposition of the issuance and sale by said city of its general bonds in the sum of One Million One Hundred Twenty-five Thousand (\$1,125,000) Dollars, for the purpose of providing money for the construction of a system of bridges for the City of Seattle across the Government Canal, Lake Union and Salmon Bay Waterway."

The council journal shows that the instrument was then "read first time and referred to Finance and Streets and Sewers committee." On May 18, 1914, at a regular meeting of the city council, the committees before named reported back the instrument to the council with the recommendation "that the same be amended to conform to Exhibit 'A' attached hereto and when so amended the same do pass." The report of the committees was adopted, and the exhibit referred to the judiciary committee for engrossment. Subsequently, at the same meeting, the judiciary committee reported the same as properly engrossed, whereupon it was "read second and third times and passed," as ordinance No. 33,133.

The exhibit was in form a completed ordinance. It contained a title which in outline substantially conformed to the instrument originally introduced. The date of the proposed election, however, was specified in the title; the amount of the bonds proposed to be issued was \$1,328,000 instead of \$1,125,000 as first named, and seemingly a body of water other than any of those mentioned in the original instrument was named across which the proposed system of bridges should be constructed. Other new matters added were some nine "whereases," containing various recitals, immediately following the title; these in turn were followed by an enacting clause, beneath which were some nine separate sections containing the provisions of the ordinance proper. These pro-

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visions we need not recite in detail. Generally, they provide the terms and conditions upon which the bonds proposed to be issued may be sold, the interest rate thereon, the time in which they shall run, and the means by which the accruing interest and the principal when due shall be paid. They also provide the time and manner in which the proposition of incurring the indebtedness shall be submitted to the electors. Four separate and distinct propositions were provided for submission for the construction of four separate bridges at as many designated places; each proposition specifying the amount of bonds to be issued for the construction of the particular bridge; all to be so arranged on the ballot as to enable an elector to vote for or against each one separately.

The propositions were submitted to the electors in accordance with the terms of the ordinance. Two of them only, however, met with the approval of the electors; these authorized the issuance of bonds in the sum of \$829,000. It is this issuance that the appellant seeks to enjoin.

The provisions of the city charter thought to be violated in the passage of the ordinance are found in sections 10, 11, 26 and 27, of art. 4, of that instrument. These in substance provide, that every legislative act of the city shall be by ordinance; that no ordinance other than an ordinance providing for appropriations for salaries or current expenses, shall be passed on its final reading at the meeting on which it is introduced; that, when loans shall be created exceeding one and one-half per centum of the taxable property of the city, and bonds therefor issued, the proposition for creating the indebtedness shall be first submitted to the electors of the city, and the mode and manner of submitting such proposition to the electors shall be prescribed by ordinance; and that no debt or obligation of any kind against the city shall be created by the city council except by ordinance specifying the amount and object of such expenditure.

It is our opinion that the appellant's contention to the effect that the charter provisions of the city were violated

in the enactment of the ordinance is well founded. The introduction of the instrument at the adjourned meeting of May 18, 1914, was in no sense the introduction of an ordinance. The instrument contained none of the elements of an ordinance; it was without body or parts; and was a mere sham and subterfuge. If it had been enacted in the form in which it was introduced, and afterwards submitted to the vote of the electors in that form, no one would contend it sufficient to authorize an issuance of bonds for any purpose; and this being so, its introduction into the city council cannot be said to be the introduction of an ordinance therein. Doubtless the instrument was intended as the title to an ordinance, subsequently to be written under it. It did not prove even sufficient for that purpose, but if it had, it would not have been the introduction of an ordinance, as clearly the introduction of a title to an ordinance is not the introduction of an ordinance.

We do not, of course, intend to deny the power of the council to amend an ordinance properly introduced, and pass it at the meeting at which it is amended. This can be done where the amendment is in matter of form, or in the addition of new matter which does not alter the effect and scope of the ordinance; but it does not permit the substitution of an entirely new and different ordinance for the one originally introduced, nor does it sanction the gross attempt at subterfuge practiced in this instance. The requirement that an ordinance shall not be passed at the meeting at which it is introduced has a purpose. It is intended to prevent hasty and ill-advised legislation. The record before us bears evidence of the salutary design of the rule. It shows that this ordinance could have with advantage received more careful consideration. Two of the propositions submitted met with the entire disapproval of the electors, and the others succeeded with no very considerable margin.

It is clear to our minds, therefore, that the city council, in the passage of the ordinance in question, did not comply with

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the requirements of the city charter. That this is fatal to an ordinance deriving its sanction wholly from the act of the city council was held by this court in *Savage v. Tacoma*, 61 Wash. 1, 112 Pac. 78. There the city had passed an ordinance providing for an extension of its water system, and had entered into a contract for the performance of the work. Subsequently, but before the work had been entered upon, the city repudiated the contract and repealed the ordinance. An action was brought for the breach of the contract, and the city pleaded in defense the invalidity of the ordinance, founding its claim upon the fact that the ordinance had been introduced and passed at the same meeting of the city council, contrary to the provisions of the city charter. The lower court sustained the plea, and this court affirmed its judgment. In the course of the opinion, the court said:

"We believe it to be the law that, where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the law-making body of the municipality to pass ordinances except in the manner required by the charter. Dillon, *Municipal Corporations* (4th ed.), § 309; Abbott, *Municipal Corporations*, § 525; Smith, *Modern Law of Municipal Corporations*, § 506; *State, Gleason Pros. v. Bergen*, 33 N. J. L. 72; *Avis v. Vineland*, 55 N. J. L. 285, 26 Atl. 149; *Danville v. Shelton*, 76 Va. 325. The ordinance being void, no authority was thereby vested in the commissioner of public works to enter into the contract, and the contract, or its breach, could not be made the basis of an action at law; . . ."

The foregoing case concludes the question against the validity of the ordinance, unless the question is taken without the rule by the fact that the incurrence of the indebtedness was subsequently approved by the electors of the city. But we cannot think this alone sufficient. An invalid ordinance is no more effective to authorize a bond issue than is the want of an ordinance, and, as we have shown, the city charter expressly provides (art. 4, § 27) that no debt or obligation

of any kind against the city shall be created by the city council except by ordinance specifying the amount and object of such expenditure, and, where the amount exceeds one and one-half per centum of the taxable property of the city and bonds therefor are to be issued, not until the proposition for creating such indebtedness shall have been submitted to the electors of the city by an ordinance providing the mode and manner of such submission (*Id.*, § 26). Since, therefore, the fundamental law makes an ordinance an essential to the institution of the proceedings, it is difficult to see how a valid issuance of bonds may be made without a compliance with such essential. But it is said that this court has announced a different rule in the case of *State ex rel. Atkinson v. Ross*, 46 Wash. 28, 89 Pac. 158. We cannot so read the case. True the court did say in the course of the opinion that the passing of the ordinance was not the most essential step in a proceeding leading up to an issuance of bonds; that the most essential step was the notice to the taxpayers, and the exercise of their right to vote upon the proposition. But an examination of the case will show that the court did not find that the vote was had and the bonds then in question issued upon an ordinance introduced and passed at the same meeting of the council. This is made clear by the concluding sentence of the opinion, wherein it is stated that "no provision of the law was violated," and by the following extract taken from an earlier part thereof:

"The findings of fact show that there were many meetings of the city council during the month of January, 1906, and while it is true that those meetings were pursuant to adjournment, it does not necessarily follow that they were adjourned or continued meetings in the sense that they all constituted one and the same meeting. It is conceded that the council had a right to call special meetings, and it is settled by authority that any business may be transacted at a special meeting, and that the purpose of the meeting need not be stated unless the law requires it, and it is conceded that the charter of Seattle does not require it. What the council did,

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in effect, when it adjourned on motion, was to call a special meeting. This intention was simply expressed by the motion for adjournment to a certain time. It is true that ordinarily this might technically constitute an adjourned meeting, but the facts show that such was not the intention in this case, for the council met regularly every Monday evening, and, instead of commencing the business where it left off at the previous meeting, the manner of transacting the business showed that it was intended to be treated as a regular meeting, the business being transacted as follows: 1. Roll call. 2. Approval of the journal. 3. Special order. 4. Communications and reports from city officers. 5. Petitions and remonstrances. 6. Reports of standing committees. 7. Introduction of resolutions. 8. Introduction of bills by committees. 9. Introduction of bills by members. 10. First reading of bills. 11. Second reading of bills. 12. Third reading of bills. 13. Unfinished business. 14. Other business. The court also found that it was generally known throughout the city of Seattle and by its citizens that the city council of the city of Seattle regularly held its meetings on Monday evening of each week, and that the council only adjourned *sine die* on the last meeting of each two years' term. So that the council evidently did not give much consideration to the parliamentary language used in the motion to adjourn, and, if bound to the technical meaning of such language, could be held to have had only one regular meeting in two years, a construction which, of course, the council did not place upon its proceedings, and which a court would not be authorized to place upon them."

The respondent further claims that it is beyond the power of the court to inquire into the manner in which the ordinance was introduced and passed, but that the enrolled bill is in itself conclusive evidence of the fact that it has been regularly enacted by the city council. This is the rule this court has applied to acts of the legislature, and is undoubtedly the rule usually applied by courts to such enactments. But we cannot think it applicable to ordinances or laws of inferior bodies. The legislature is, in virtue of the constitution, "the judge of the election, returns, and qualifications of its own members," and has power to prescribe "the rules

of its own proceedings." It has, therefore, the sole right to judge of the regularity and sufficiency of its own proceedings. Moreover, it is one of the three co-ordinate branches of the government, and, aside from the public inconvenience and positive harm that would result from another rule, it is but showing that respect and proper deference which each department owes to each of the others, to presume that a law regular upon its face, has been enacted with due reference to the requirements of the constitution regulating the manner of its passage. But the city council stands on another plane. It exercises a delegated authority, and can legislate only upon certain subjects and in a prescribed manner. The rules governing its proceedings are prescribed by another body, and it is proper that an authority be exercised to see that it performs its functions in the prescribed manner. The fact that the city of Seattle is a city of the first class and may frame its own charter, does not affect the principle. A charter so framed must be "consistent with and subject to the constitution and laws of this state," and no independent or extraordinary exemption can be claimed because it has this privilege. Furthermore, this court has, from the earliest time, exercised the right of inquiry into the regularity of the passage of city ordinances. We did so inquire in *Vancouver v. Wintler*, 8 Wash. 378, 36 Pac. 278, 685; *Raborn v. Mish*, 12 Wash. 167, 40 Pac. 731; *State ex rel. Atkinson v. Ross*, *supra*; *State ex rel. Northern Pac. R. Co. v. Hughes*, 53 Wash. 651, 102 Pac. 758; and in *Savage v. Tacoma*, *supra*. And in the last cited case, as we have heretofore shown, we held an ordinance invalid for the precise reason urged against the validity of the ordinance before us.

The foregoing considerations require a reversal of the judgment entered by the court below, and we could properly end the discussion here. But the appellant has suggested other questions going to the power of the city to issue bonds for this particular purpose, and it may simplify any further

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proceedings the city may desire to take if we notice them at this time.

The city charter, in art. 4, § 18, subd. 7, provides:

"That whenever the city of Seattle or the Port of Seattle shall have presented to the qualified electors of either municipality for adoption or rejection, and there shall have been adopted by vote of the electors voting thereon a comprehensive plan or scheme of harbor or port improvement, that the control of such streets and the title to any lands belonging to the city which shall fall within the limits of such proposed improvement shall pass to or be vested in the Port of Seattle within thirty (30) days after said Port of Seattle is prepared to proceed with the improvement so authorized and shall have so certified to the city council."

It is contended by the appellant that under this provision of the charter, the Port of Seattle has some right in, or authority over, the waterway across which the bridges intended to be constructed out of the funds derived from the bond issue in question would extend, and that the city could not properly proceed with the construction of such bridges, without an agreement with or consent from the Port of Seattle. But we agree with the city that this provision of the charter is not self-executing; that the Port of Seattle's interest will only accrue when the "comprehensive plan or scheme" therein mentioned has been adopted, and that until then the city's power over its streets is absolute.

It seems, also, that the city has not acquired, up to the present time, from the individual owners, all of the land necessary to be used in the construction of one of the contemplated bridges, and it is thought that bonds cannot properly be issued for the construction of the particular bridge until such land is obtained by the city. But since it is not shown that there is any impediment in the way of the city which will prevent it from ultimately obtaining the property, we cannot think the obtaining of the property anything more than a mere detail of the general scheme which will be accomplished in due season. The obtaining of real property on

which to place a bridge is not made by the city charter a condition precedent to issuing bonds to procure funds for the construction of the bridge, and we are clearly of the opinion that the validity of bonds so issued cannot be affected by the fact that the necessary property has not been acquired in advance.

For the reason first suggested, the judgment of the trial court is reversed, and the cause remanded with instructions to enter a judgment in accordance with the prayer of the complaint.

Crow, C. J., ELLIS, MOUNT, and MAIN, JJ., concur.

[No. 12033. Department Two. January 4, 1915.]

R. L. WECHNER, *Administrator etc., et al.*, *Appellants*, v.
H. G. DORCHESTER, *Respondent*.¹

MORTGAGES—FORECLOSURE—SALE—REDEMPTION—SUBSEQUENT JUDGMENT SALES—RIGHTS OF PURCHASER—TITLE. Where a judgment creditor, having redeemed from a mortgage foreclosure sale cutting off his judgments, caused the property to be sold under execution on his judgments to D., and also afterwards assigned to D. his certificates of redemption from the mortgage foreclosure sale, such execution sales passed no more than a right to redeem from the mortgage foreclosure sale, time for which redemption was not extended by the executions upon the judgments; and D. was accordingly entitled to demand the sheriff's certificate of sale on foreclosure, after expiration of the period of redemption, although in the meantime he had sold his interests by virtue of the judgments and execution sales thereunder to a third party, with notice of all the proceedings.

SAME—RIGHT OF ASSIGNEES OF JUDGMENT—ESTOPPEL. In such a case, there being no fraud alleged and all the parties having full notice of all the proceedings and the state of the title, the assignment and sale of whatever rights the judgments or the sales thereunder carried, without any intention to release the rights secured by redemption from the mortgage foreclosure sale, does not estop the assignee of the redemptioner from the mortgage foreclosure sale to assert that his assignment and sale of all interests under the judg-

¹Reported in 145 Pac. 197.

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ments did not convey the title to the land; since estoppel does not operate where all parties had equal knowledge, and no misrepresentations or attempts to deceive were made.

Appeal from a judgment of the superior court for Clarke county, Donald McMaster, Esq., judge *pro tempore*, entered August 22, 1913, upon findings in favor of the defendant, in an action to quiet title, tried to the court without a jury. Affirmed.

Miller, Crass & Wilkinson, for appellants.

H. W. Arnold, for respondent.

MOUNT, J.—This action was brought to cancel a deed upon certain real property, and to quiet the title thereto in the plaintiffs. Upon issues joined, the cause was tried to the court without a jury. Findings of fact were made and a judgment was entered awarding the plaintiffs \$665.47, with interest thereon, but denying a cancellation of the deed, and refusing to quiet the title in the plaintiffs. The plaintiffs have appealed.

The principal facts in the case are stipulated and are in substance as follows, stated in chronological order: In the year 1908, Oliver Walling and others were the owners of the tract of land in controversy, in Clarke county, Washington. The owners had executed and delivered two mortgages upon their real estate, one in favor of one Laverdieur, and the other in favor of one McKenna. These mortgages were duly recorded. Subsequent to the mortgages, three judgments were obtained against the mortgagors in favor of one J. P. Johnson. These judgments will be hereafter referred to as the Johnson judgments.

In January, 1909, an action was brought to foreclose the mortgages. The mortgagors and their judgment creditors were all made parties. While that action was pending, and on March 3, 1909, the owners, by quitclaim deed, conveyed all their interest in the property to one F. V. Arnold, who had notice of the foreclosure proceedings and purchased subject

thereto. Thereafter, on August 14, 1909, the mortgaged property in question was sold under a decree of foreclosure and bid in by J. J. Attridge. The mortgaged property at this sale brought enough to satisfy the mortgages, but there was nothing to apply upon the Johnson judgments.

On March 22, the Johnson judgments were assigned to one Epperson. And on March 26, 1910, Epperson gave notice of intention to redeem from the purchaser at the mortgage sale. Afterwards on March 31, 1910, Epperson redeemed by paying the amount of the selling price with interest to J. J. Attridge, the purchaser at the mortgage sale.

Thereafter on April 26, 1910, Arnold conveyed, by quitclaim deed, his interest in the property to J. J. Attridge. On August 13, 1910, Epperson being the owner of the Johnson judgments and having redeemed from the mortgage sale as hereinbefore stated, caused an execution to be issued on the Johnson judgments, and the real estate in question was sold under this execution to the defendant H. G. Dorchester. On November 15, 1910, Epperson sold and assigned to Dorchester the certificate of redemption under the mortgage foreclosure above referred to. All these sales and assignments above referred to were duly recorded in the auditor's office of Clarke county where the property was situated. All the parties at all times had full notice of these conveyances.

On December 26, 1910, at the request of Attridge and his counsel, Dorchester sold his interest in the Johnson judgments and the certificate of sale thereunder to Attridge for the sum of \$665.47, being the price Dorchester had paid. On May 1, 1911, Dorchester, under his certificate of redemption from the mortgage sale, demanded and received a sheriff's deed for the property in question. This action was brought to set aside this deed. As stated above, the trial court concluded that the sheriff's deed of May 1, 1911, conveyed in fee the title of the property in dispute to the defendant Dorchester; but found that the sale of the interest in the Johnson judgments to Attridge for \$665.47 was without

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consideration and, therefore, ordered this money returned. The appeal is prosecuted from that judgment. The defendant did not appeal.

It is apparent from this statement of facts, which are agreed to, that the only interest which Attridge had to the property in dispute was acquired under the sale of the property by virtue of the Johnson judgments. It is conceded by the appellants, as we understand, on the briefs, that the Johnson judgments were simply liens upon the real estate, subject to the mortgage liens, and that these liens gave the right of redemption within the statutory period, which is one year from the date of sale. Rem. & Bal. Code, § 595 (P. C. 81 § 985). And it is also apparently conceded that an execution issued upon these judgments did not and could not extend the time for redemption. The execution upon the Johnson judgments clearly conferred no new rights upon the holders of these judgments. The defendant Dorchester regularly obtained title to the land in question at the time the sheriff's deed was issued on May 1, 1911, by virtue of the mortgage foreclosure. He was also the holder of the sheriff's certificate of sale under the subsequent Johnson judgments. At this time the right of redemption of any party or any subsequent purchaser with notice had fully expired. The plaintiff Attridge, who was the first purchaser at the mortgage sale, and from whom the property had been redeemed, had acquired a supposed interest from Mr. Arnold. The only interest which he acquired from Arnold was clearly a right to redeem within the year, which he did not do. His rights from that source were then lost.

Counsel for the appellants make some contention in their brief to the effect that Attridge was induced by fraud to purchase the certificate of sale under the Johnson judgments; and also that the defendant Dorchester is estopped to say that the title to the property was not sold to Attridge for the sum of \$665.47 when the certificates of sale under the Johnson

judgments were sold. There is no merit in either of these contentions. No fraud is alleged in the complaint, and clearly no fraud was proven. All the parties who had anything to do with the transaction knew of all these transfers. At the time Dorchester sold the certificate of sale under the Johnson judgments to Attridge for \$665.47, Mr. Attridge was represented by counsel who knew all the facts, who had examined the records, was informed of all these conveyances, and presumably knew the effect of the conveyances. They sought the purchase, which was not offered to them. It was not intimated or intended at the time of this sale that Dorchester was releasing his rights to a deed under the foreclosure sale. He sold whatever rights the Johnson judgments, or the sale under the Johnson judgments carried, and nothing more. We are satisfied that when Attridge purchased the certificates under the Johnson judgments he knew just what he was purchasing. In order to create an estoppel it is necessary that:

“The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.” 11 Am. & Eng. Ency. Law (2d ed.), p. 484.

See, also, *Globe Nav. Co. v. Maryland Casualty Co.*, 39 Wash. 299, 81 Pac. 826. The evidence upon this question is clear and certain to the effect that all the parties had equal knowledge. Dorchester knew what he was selling; Attridge knew what he was buying; both were dealing at arm's length; and neither made any representations, or attempted to deceive the other, unless Attridge supposed that in buying the certificate of sale under the Johnson judgments he might acquire some advantage over the holder of the certificate under the mortgage sale. We are satisfied from a review of the whole record that the trial court properly refused to set

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aside the sheriff's deed of May 1, 1911, to Mr. Dorchester.

The judgment is therefore affirmed.

Crow, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 12067. Department Two. January 4, 1915.]

EUGENE A. MUELLER, *by his Guardian etc., et al.*,
Respondents, v. GRAHAM B. DENNIS,
Appellant.¹

MASTER AND SERVANT—INJURIES TO SERVANTS—INEXPERIENCED EMPLOYEE—WARNING—DEFECTIVE APPLIANCES—EVIDENCE—SUFFICIENCY. The master is liable to an inexperienced elevator boy, injured by being caught through a peculiar action of the elevator in starting or stopping it, where it appears that he had no previous experience, and had used the elevator only two or three times before the accident, that he was only instructed that a certain pull on the cable would start it and an opposite pull would stop it; but there was evidence tending to show that its operation was peculiar, because it would start with a jerk, and frequently required several pulls in order to stop it, or would start of its own accord after being apparently stopped, of which facts he was not warned.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered August 20, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an elevator boy in handling an elevator. Affirmed.

Cullen, Lee & Matthews, for appellant.

Zent, Powell & Redfield, for respondents.

MOUNT, J.—This is an action for personal injuries. The plaintiff recovered a judgment for \$1,425 upon a verdict of a jury. The defendant has appealed.

The four assignments of error made in the brief are all based upon the question of the sufficiency of the evidence to take the case to the jury. According to the evidence on be-

¹Reported in 145 Pac. 218.

half of the plaintiff, he was a boy a little over 18 years of age at the time of the injury. He was employed by the appellant to work at certain hours in an apartment house, owned and conducted by the appellant. A part of his duties consisted in assisting the janitor. At the time he was employed he was instructed to obey the janitor and do what the janitor told him to do.

There was a freight elevator in the building. This elevator was used only for freight. It was started and stopped by means of a cable. The janitor instructed the boy that to start the elevator it was necessary to give a certain pull on the cable, and that to stop the elevator it was necessary to pull upon the cable in the opposite direction. These were all the instructions given.

The plaintiff had made two or three trips on the elevator prior to the time he was hurt. He had never operated an elevator other than this one. The testimony of the boy who had preceded the plaintiff in his employment was to the effect that the operation of the elevator was peculiar, because it would start with a jerk and frequently require several pulls in order to stop it. The plaintiff was not told of this fact.

On October 11, 1912, the janitor left the keys of the elevator with the plaintiff and told him to deliver certain packages to tenants at about three o'clock of that day. In obedience to this direction the plaintiff took some packages to the elevator in the basement, unlocked the door, laid the packages on a ledge between the door and the elevator shaft, and then brought the elevator cage which at that time was in the well below the basement floor to the level of the floor, and stopped it by giving a pull upon the cable. While he was stooping over to reach the packages and place them in the elevator cage, the cage started, caught him, and carried him partly in the cage to the top of the door, and there caught him and injured him.

If it is true that this elevator sometimes required two or three pulls on the cable in order to stop it, or that it would

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sometimes start of its own accord after being apparently stopped, as the evidence of the plaintiff seems to indicate, it was, we think, clearly the duty of the defendant or the janitor who had charge of the building to instruct the boy of that fact.

It is contended by the appellant that there were no defects in the elevator, that it had been inspected and was in perfect order, and that the defendant had no knowledge of the peculiarity above mentioned. The appellant's evidence tended to show these facts. If this peculiarity existed, which was a question for the jury, it was also a question for the jury to say whether the defendant knew, or in the exercise of ordinary care should have known the fact. If he knew, or should have known, as the jury evidently concluded he did, it was negligence not to instruct the boy thereof. The boy was shown to be an intelligent boy for his age; but we think he was not required to take notice of a peculiarity such as this when he was inexperienced in the use of elevators, had not been told and did not know of the peculiarity, and had used the elevator but two or three times prior to the time he was hurt, and then did not observe the peculiarity. We are satisfied, therefore, that the court properly submitted the case to the jury.

The judgment is affirmed.

CROW, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12085. Department Two. January 4, 1915.]

NORDEEN IRON WORKS, *Respondent*, v. B. J. RUCKER *et al.*,
Appellants.¹

WORK AND LABOR—QUANTUM MERUIT—EFFECT OF EXCESSIVE PRICE—ACTIONS—ISSUES—INSTRUCTIONS. In an action to recover the reasonable value of machinery ordered and accepted by the defendants, upon issues as to whether the goods were ordered from plaintiff by defendants and accepted by defendants, and their reasonable value, it is error to instruct the jury that, if they find that the machinery was ordered by defendants, and manufactured and delivered by plaintiff to defendants, they must find for the plaintiff, unless the jury further found that plaintiff charged for the same in excess of the reasonable value thereof; because, if the machinery was ordered, delivered to, and accepted by defendants, they would be liable for the reasonable value thereof, regardless of the price asked.

SAME—QUANTUM MERUIT—ISSUES AND PROOF—INSTRUCTIONS. In an action to recover the reasonable value of machinery delivered to, and accepted by the defendants, upon issues as to whether the goods were ordered from plaintiff by defendants, and accepted by defendants, and their reasonable value, it is error to instruct the jury that if they find defendants could have purchased the machinery on the open market for considerably less than the amount claimed by plaintiff, they could take that fact into consideration in determining whether or not there was a contract entered into between the plaintiff and defendants; since there was no contract in issue and no price had been agreed upon, making the instruction confusing and misleading.

APPEAL—REVIEW—PREJUDICE—PRESUMPTIONS. Prejudice will be presumed from erroneous instructions on material questions, unless it clearly appears from the whole case that there was no prejudice.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The discretion of the trial court in granting a new trial will not be disturbed on appeal, unless there was a clear abuse of discretion, or the record discloses that the order was made because of a misconception of the law.

Appeal from an order of the superior court for Snohomish county, Alston, J., entered January 12, 1914, granting a new trial on account of erroneous instructions, after the verdict of a jury in favor of the defendants. Affirmed.

¹Reported in 145 Pac. 219.

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Coleman, Fogarty & Anderson and W. P. Bell, for appellants.

Jesse H. Davis, for respondent.

MOUNT, J.—This appeal is from an order granting a motion for a new trial. The plaintiff brought the action to recover the reasonable value of certain articles of mill machinery, alleged to have been ordered by the defendants from the plaintiff and thereafter manufactured by the plaintiff and delivered to and accepted by the defendants. The answer was a general denial. The case was tried to the court with a jury. A verdict was returned in favor of the defendants. The plaintiff then filed a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict; errors in law occurring at the trial; and erroneous instructions given by the court. The trial court granted this motion upon the latter ground. The defendants have appealed from that order.

Upon the trial of the case, there were three well defined issues as follows: (1) Were the goods ordered from the plaintiff by the defendants? (2) Were the goods accepted by the defendants? (3) The reasonable value of the goods. These questions were all disputed in the evidence.

The court gave the following instruction to the jury:

“You are instructed that if you find by a preponderance of the evidence that S. J. Pritchard was, on or about the 22d day of May, 1913, authorized to purchase for and on behalf of defendants the machinery mentioned in plaintiff's complaint herein, and that he did, on or about said date order from plaintiff, for and on behalf of defendants said machinery, and that pursuant to said order the plaintiff manufactured said machinery and delivered the same to said defendants, you must find for the plaintiff, unless you further find that the plaintiff charged for the same a price in excess of the reasonable value of said machinery, as hereinafter instructed.”

The court also instructed the jury as follows:

“The court instructs the jury that if you find by a preponderance of the evidence in this case that the machinery

and supplies mentioned in the plaintiff's complaint in this action could have been purchased by said defendants in the open market for a sum considerably less than the amount claimed to be due by the plaintiff for such machinery at the time it is alleged the order was given therefor, then you are further instructed that you may take this fact into consideration in determining whether or not there was a contract entered into between the plaintiff and defendants as alleged in plaintiff's complaint herein."

The trial court was of the opinion that these instructions were wrong; and of this conclusion we have no doubt. For he said to the jury that, if the machinery was ordered by the defendants and delivered to the defendants, that the plaintiff was entitled to recover unless the jury found "that the plaintiff charged for the same a price in excess of the reasonable value of said machinery, as hereinafter instructed." There was no instruction thereafter which modified that instruction. It is too plain for argument that this instruction was erroneous. Because if the machinery was ordered by the defendants and delivered to and accepted by the defendants, the plaintiff was entitled to recover the reasonable value thereof, no matter what the plaintiff charged. It was not claimed at any stage of the cause that there was any contract as to the price of the machinery. The plaintiff therefore, if entitled to recover at all, was entitled to recover the reasonable price. While this instruction tells the jury that if they should find that the price charged was in excess of the reasonable value, the plaintiff was not entitled to recover. This instruction was therefore clearly erroneous.

The other instruction was erroneous because it told the jury that if they should find that the machinery and supplies could have been purchased by the defendants in the open market for a sum considerably less than the amount claimed, then the jury might take this fact into consideration in determining whether or not there was a contract entered into between the plaintiff and the defendants, as alleged in the

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complaint. This instruction is erroneous because there was no issue in the case as to any contract price. It was conceded that no price was agreed upon or mentioned at the time the machinery was ordered, if it was ordered at all. This instruction was misleading and confusing to the jury, and should not have been given.

It is argued by the appellants that conceding these instructions to be erroneous, the trial court should have denied the motion, because the judge was of the opinion that no other verdict could have been rendered in the case. A number of cases from this court are cited to the effect that where the verdict is in accordance with the evidence and in consonance with justice, the verdict will be sustained, even though erroneous instructions are given by the court. This rule would apply to a case where the court refused to grant a new trial for that reason. But in this case, while the trial court may have been of the opinion that the verdict was just, yet he refused to place his judgment upon that ground. He granted the motion because of these erroneous instructions. The trial court was of the opinion that the instructions were erroneous. He was also of the opinion that the instructions were misleading to the jury, and, in view of the fact that the principal questions in the case were disputed questions of fact, concluded that the jury must have been guided by these instructions, and returned a verdict because thereof.

Where erroneous instructions are given upon material questions, prejudice will be presumed unless it clearly appears from the whole case that there was no prejudice. It does not so appear in this case. There was some discretion in the trial court in granting or refusing to grant a new trial. And we have frequently said that,

"It is a general rule applicable to all cases that an order granting a new trial will not be disturbed in the absence of a clear abuse of discretion, unless the record discloses that the order was made because of a misconception of the law appli-

cable to the case." *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88, and cases there cited.

We are satisfied that the trial court properly granted the motion for a new trial, and the order is therefore affirmed.

CROW, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 12381. Department Two. January 4, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Raymond Light & Water Company, Respondent*, v. PUBLIC SERVICE COMMISSION *et al.*, *Appellants*.¹

WATERS AND WATER COURSES—WATER COMPANIES—REGULATION—RATES—CONTRACTS—POWER OF COMMISSION. Agreements made by a water company, in acquiring all the water supply of mill companies without reservation, to furnish the mill companies with water for a stated period, free or at reduced rates, are not either void or voidable under the terms of the public utilities act, subsequently enacted, 3 Rem. & Bal. Code, § 8626-1 *et seq.*, prohibiting preferences and discrimination between patrons, in view of the proviso that nothing in the act shall prevent any water company from continuing to furnish its product or service under any contract in force at the date this act takes effect, thereby excepting such prior contracts; and § 8626-34 of the act authorizing the commission, in its discretion, to direct by order that such contracts shall be terminated by the company, as and when directed by such order, does not authorize the commission to terminate the contracts, but only authorizes a termination of such contracts, if legal, by the consent of the parties or such legal proceedings by the company as may be proper.

SAME—REGULATION—LEGAL CONTRACTS—JURISDICTION—ORDERS OF COMMISSION. Upon an application by a city alleging unreasonable and excessive rates and inadequate service by a water company, which had obligated itself, in the acquisition of its water supply, to furnish free water to the owners of the water, the public service commission has jurisdiction to determine the issues presented between the city and the water company as to the reasonableness of rates and adequacy of service; and under its discretionary power to order the termination of any such contract for free water, its order to that effect will be construed as a direction to the water company to take steps to terminate such contracts, if the contracts were legal and binding.

¹Reported in 145 Pac. 215.

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SAME—REGULATION—CONTRACTS—TERMINATION—DISCRETION OF COMMISSION. Since, by Rem. & Bal. Code, § 8626-34, it is discretionary for the public service commission to order the termination of contracts for the supply of water entered into prior to the taking effect of the act, the commission may, after ordering the termination of contracts for free water, upon the intervention of the parties interested, vacate its order, where it appears that the water company's deed for its water supply and the contracts for free water to the grantors in such deed were parts of one and the same transaction, and that one was the consideration for the other.

Appeal from a judgment of the superior court for Thurston county, Claypool, J., entered May 28, 1914, reversing, on writ of certiorari, an order of the public service commission fixing rates for public water service. Reversed.

The Attorney General and *B. O. Graham*, for appellants Public Service Commission *et al.*

Corwin S. Shank and *H. C. Belt*, for appellants Willapa Lumber Company *et al.*

Grosscup & Lee and *George Dysart*, for respondent.

MOUNT, J.—This appeal is from an order of the superior court for Thurston county, reversing an order of the public service commission. The Willapa Lumber Company, the Siler Mill Company and the public service commission have each appealed from the order of the superior court.

The facts are as follows: In August, 1912, the city of Raymond, by its proper authorities, filed a complaint against the Raymond Light & Water Company with the public service commission, challenging the rates of the water company as unreasonable and excessive, and alleging that the supply of water furnished by the water company to the citizens of Raymond was inadequate and insufficient. The Raymond Light & Water Company answered the complaint, and alleged that, under the existing rates, its returns upon its investment were insufficient, and alleged that it had spent large sums of money in furnishing the city of Raymond with a water supply, and intended to still further extend and expand its plant.

Thereafter in February, 1913, a hearing was had before the public service commission upon the issues raised by the complaint and answer. Testimony was introduced, and in the course thereof it developed that there were two outstanding water contracts, made and entered into between the Willapa Lumber Company, the Siler Mill Company, and the Raymond Light & Water Company, in the year 1904, by which the water company was deriving and would derive no revenue therefrom for a period of 49 years. Upon the conclusion of the testimony the public service commission entered its findings of fact and conclusions of law to the effect:

(1) That the respondent water company had, for a period of years, furnished water free or at reduced rates to the Siler Mill Company and the Willapa Lumber Company and that, if such water so furnished free had been charged for on the basis of the published tariff rates, the estimated increased income of the water company would be approximately \$3,600 per year.

(2) That the rapid and unusual growth of the city of Raymond had necessitated a rapid extension of water mains and increased water supply and continual and unusual expenditures by the water company.

(3) That the water company had failed and neglected to meet its obligations to the city of Raymond and the inhabitants thereof, and had failed to provide an adequate and sufficient supply of water for domestic and manufacturing purposes and had failed and neglected to furnish water under sufficient pressure to insure fire protection, and had failed and neglected to provide suitable mains for distributing the water supply.

(4) That the rates and charges of the water company had been varied and discriminatory on account of the contracts with the Willapa and Siler companies, and that such contracts should be terminated and such discriminatory practices discontinued.

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(5) The commission then ordered the water company to submit detailed plans to the commission, showing clearly the manner in which the water company proposed to improve its water system and meet its obligations to the public, by providing wholesome water in sufficient quantity to reasonably serve the city of Raymond and to give the estimated cost of such improvements and full information as to the financial ability of the company to successfully carry out such plans.

(6) The water company was then ordered to install meters upon the plants of the Willapa and Siler companies and to desist from extending further discriminatory privileges to such plants, and to collect from all consumers alike the amount due for water on the basis of the company's published tariffs; and further, that the contracts with the said companies should be terminated and the water company ordered, for a period of one year, to keep an accurate account of all moneys received from and all charges made to these mill companies and others that had been receiving free water, to the end that the commission might be intelligently advised as to what revision, if any, could be made in the rates of the respondent water company.

Thereafter the water company complied with this order of the commission, and filed plans with the public service commission showing to what extent and in what manner it proposed to improve its water system. It further notified the Siler and Willapa companies of the termination of the water contracts, and proceeded to collect from these industries water bills under the published tariff of rates. The water company installed meters upon these plants, and in all other respects complied with the commission's order. The water company prosecuted no writ of review from the commission's order. The Siler and Willapa companies paid their water bills for a period of several months under protest.

Thereafter in June, 1913, the Willapa and Siler companies filed with the commission a petition in intervention in which it was alleged in substance:

(1) That the mill companies in question had not been made parties to the original proceeding and were not served and did not appear therein.

(2) That the commission had no jurisdiction over the subject-matter of the water contracts between these mill companies and the water company.

(3) That the order entered by the commission with reference to the subject-matter of these contracts deprived the mill companies of valuable property rights without due process of law, and impaired the obligations of such contracts.

The petition in intervention also alleged that, prior to the organization of the Raymond Light & Water Company, the interveners were the owners of the water plant which was then in existence and which was used by them in conducting water from the source of supply to their respective mills; that, when the water company was organized they transferred the water plant to the water company and reserved to themselves such water as they might need for their respective manufacturing plants.

Upon this showing, the Willapa and Siler companies were allowed to intervene, and the public service commission reopened the case upon the issues presented in the petition of the mill companies. After a somewhat extensive hearing going into the history of these contracts with the mill companies, the commission made and entered findings of fact, finding in substance: That the Willapa and Siler companies at the time of the transfer of the water plant to the water company reserved to themselves sufficient water for the use of their respective plants, and then concluded in substance:

(1) That the water mentioned in the contracts between the Siler and Willapa companies and the respondent water company was reserved to the mill companies;

(2) That the commission had not at the time of making the order of February, 1913, which order terminated the said

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contracts, acquired jurisdiction over either of said mill companies, or over the subject-matter of said contracts.

(3) That the original order of the commission be modified in so far as it authorized the termination of the said contracts and permitted the Siler and Willapa companies to take and use water as before.

The rest of the original order was not changed.

From this decision of the commission, the respondent water company sued out a writ of review to the superior court for Thurston county. After a hearing, that court entered a judgment on May 28, 1914, by which the last order of the public service commission was annulled, reversed and set aside, and the first order of the public service commission was reinstated. From that judgment, this appeal is prosecuted, first, by the public service commission, and second by the mill companies.

The lower court apparently based its judgment upon the conclusion that the contracts entered into between the water company and the mill companies in the year 1904 were avoided by the act of 1911 (Laws of 1911, p. 538; 3 Rem. & Bal. Code, § 8626-1 *et seq.*, relating to the public service commission), because these contracts were contracts for free water to these companies for a period of 49 years; and for the further reason that the deed by which the water works of the mill companies was transferred to the water company did not contain a reservation of water, but transferred the whole rights of the mill companies to the water company; and that the public service commission, in making the first order, had jurisdiction of the parties and authority to cancel these contracts for free water.

The respondent, in a voluminous brief in answer to voluminous briefs filed by the appellants, states that there are but three questions in the case, as follows: First, Had the public service commission jurisdiction over the persons of the mill companies in making the original order terminating the contracts between the mill companies and the water company;

Second, Had the commission jurisdiction over the subject-matter of the contracts between the interveners mill companies and the respondent water company; and Third, Had the commission the legal right to terminate these contracts in the exercise of its police power?

It is argued by the respondent that the public service commission had jurisdiction to terminate these contracts in the exercise of the police power of the state. If the contracts were contracts which the state, in the exercise of its police power, had a right to terminate and which the state had declared void, as were the contracts in the case of *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, or in the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D. 78, or in *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, we would have no doubt of the right of the water company, or of the public service commission, to terminate these contracts. But it seems to us that the contracts involved in this case do not partake of the nature of the contracts in those cases. Conceding that there was no reservation of any part of the water on the part of the mill companies when the transfer of the water system was made to the water company, and that simple contracts were entered into by which the water company agreed to furnish water to these mill companies for a period of 49 years, we are still satisfied that the commission act in question does not make these contracts, or contracts of this character, either void or voidable, because at § 34 of the commission act, Laws of 1911 p. 561 (Id., § 8626-34), the act provides:

"Nothing in this act shall be construed to prevent any gas company, electrical company or water company from continuing to furnish its product or the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, That the commission shall have power, in

its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order: . . .”

The act in prior sections provides that water companies shall not make or grant any undue or unreasonable preference or advantage to any person or corporation, that there shall be no discrimination between patrons, and then provides as quoted above, that nothing in this act shall prevent any water company from continuing to furnish its product or service under any contract in force at the date this act takes effect. It seems plain, therefore, that it was the intention of the act that contracts of the character of these were not declared illegal, or even voidable, because they are expressly excepted.

It is true the section then provides that the commission shall have power, in its *discretion*, to direct by order that such contract or contracts shall be terminated by the company party thereto, and that thereupon such contract or contracts shall be terminated *as* and *when* directed by such order. This simply means that if a contract has been entered into, it is within the power of the public service commission, in its discretion, to order that such contract shall be terminated by the company in the manner directed by the public service commission. It was intended, no doubt, that, when a contract of the character of these in question is detrimental to the service of the company furnishing water, the public service commission, if it finds this to be a fact, may direct the termination of such contract. It would be for the parties to the contract to terminate it. If it was a void contract, it might be terminated without damages. If it was a valid and binding contract, before it could be terminated, damages would necessarily be assessed. It could not be reasonably contended that, if a public service corporation furnishing water to a city had acquired by purchase the right to take a certain portion of a stream for the purpose of

furnishing water to its patrons, and it should eventuate that the whole stream was necessary, the public service commission would have the power to require the owner of the stream to deliver it to the public service corporation without compensation. The public service commission could only direct that the public service corporation should acquire the stream by proper and legal methods. And so in this case, these were valid contracts when entered into, upon valid and good considerations. The commission act, as above stated, exempts these contracts from the operation of the statute, except that the public service commission, in the exercise of its discretion may require the companies, or the parties to the contracts, to terminate them. By reason of this exception in the statute we are satisfied that these contracts are neither void nor voidable. They were valid and binding obligations which the statute does not attempt to avoid, but expressly exempts.

Upon the question of jurisdiction, we are satisfied that the public service commission had jurisdiction to determine the questions presented upon the original application between the citizens of Raymond and the water company. It had a right, no doubt, to inquire into the quantity and quality of the water furnished to the citizens, and the facilities for furnishing water. It was authorized to inquire into the reasonableness of the rates; and, for that purpose, to inquire whether water was being furnished free or otherwise. And under its powers in this respect, it might require the water company to desist from furnishing free water. But we are satisfied that the public service commission was not authorized to set aside the contracts in question, first, because the statute does not give the public service commission that authority, and second, even if the statute did give this authority, the beneficiaries under the contracts were clearly entitled to a hearing upon that question. We think the order of the public service commission first made must be construed as directing the water company to terminate the contracts, and did not in itself termi-

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nate the contracts. After this order was made, and after the water company had notified the mill companies that the contracts were terminated, the mill companies then intervened in the case, and alleged in substance, that the contracts ordered to be terminated were valid and binding contracts, that they were the consideration for the transfer of the water plant to the water company, and that the right to take water from the plant was reserved by the mill companies. The public service commission was then asked to vacate the order requiring the termination of the contracts. As we have seen above, § 34 expressly provides that the public service commission shall have power in its discretion to terminate such contracts. In short, the authority of the commission was *discretionary*. It might exercise that power or not as the facts or circumstances warranted. After a full and complete hearing upon the question whether these contracts were in effect contracts for free water or otherwise, the commission determined that they were not contracts for free water, but that there was a reservation of the water used by the mill companies at the time the water plant was transferred to the water company. It is obvious that the public service commission should have taken these facts into consideration before making its first order. It did not do so. It was not apprised of the facts or circumstances which led up to the making of the contracts. Upon a full hearing of all the evidence upon this question, the commission was of the opinion that, while the deed from the mill companies to the water company made no specific reservation of water, the contracts and deed, when taken together, showed that it was intended by the parties that there was a reservation of water sufficient and necessary for the mills. And, therefore, the commission exercised its discretion and vacated its first order. It is true there is no reservation in the deed conveying the water plant to the water company. The deed recites that it conveys a certain quantity of land, making no mention of water. It does not even mention appurtenances to the land. The con-

tracts in question were executed a few months later. These contracts recite that the mill companies may connect with the pipes of the water company and use a sufficient amount of water to run their mills for a period of forty-nine years. The evidence clearly shows, we think, that these contracts and deed were a part of one and the same transaction, and that one was the consideration for the other. The evidence also shows that it was the intention of all the parties at the time this deed and these contracts were made that the mill companies should reserve sufficient water for the use of their mills at all times during the period named. The mills to which the water was conveyed and the land upon which the water was used by the mill companies were not transferred to the water company. The deed conveyed simply a tract of land at the headgates of the creek where the water was taken, and a right of way to the town of Raymond. We are satisfied, upon the whole case, that the public service commission in making its last order vacating the first order was acting within its discretion; that there is nothing in the case to justify the conclusion that this discretion was abused; and we are satisfied, therefore, that the trial court was in error in setting aside the last order and reinstating the first order. What we have said above disposes of the case upon its merits, and there is no necessity to discuss other questions presented in the briefs.

The judgment is therefore reversed, and the writ ordered dismissed.

Crow, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

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Syllabus.

[No. 11215. *En Banc*. January 5, 1915.]

JENNIE I. PIERCE, *Plaintiff*, v. SEATTLE ELECTRIC
COMPANY *et al.*, *Defendants*.¹

APPEAL—REHEARING—SCOPE—MATTERS NOT PREVIOUSLY URGED. Where, pending an appeal, the supreme court, in another case, announced a new rule of practice whereby, when a new trial had been granted upon some specific ground, on appeal therefrom the respondent might sustain the order by urging all the grounds covered in his motion, the supreme court will, on granting a rehearing, give respondent the advantage of applying the new rule, although not urged in the briefs on appeal or on oral argument; it appearing that the new rule had not been announced when the briefs were prepared, and was not known to counsel when the cause was first argued, having been promulgated for but a short time.

DAMAGES—PERSONAL INJURIES—EVIDENCE—EARNING CAPACITY—PROSPECTIVE PROFITS—ADMISSIBILITY. In an action for personal injuries sustained by a woman who was selling hair goods, evidence that she contemplated opening a place for the sale of hair goods, is competent on an issue as to her loss of earning capacity, as tending to show her ability to work and transact business, and is not objectionable as showing anticipated profits, where no specific statement was made as to amount of anticipated profits lost.

WITNESSES—IMPEACHMENT—REDIRECT EXAMINATION—SCOPE. Where, on laying the ground for the impeachment of a witness, the witness denied making any such statement as was imputed to her, it is not prejudicial error to refuse to allow the witness, on redirect at that time, to detail a conversation held at the time in question; especially where, after the direct impeachment of the witness, she was not called in rebuttal to give her version of the matter, and no excuse was given for failing to recall her.

RELEASE—FRAUD—BURDEN OF PROOF—INSTRUCTIONS. Where one of the defenses in a personal injury case was a release and discharge, alleged by plaintiff to be procured by fraud, a general instruction that the burden of proving the affirmative defenses was upon the defendant, is not misleading or error, where, as to this particular defense, the jury was instructed that the burden was upon the plaintiff to overcome the defendant's *prima facie* case by evidence that was "clear, strong, satisfactory, and convincing."

¹Reported in 145 Pac. 228.

SAME—FRAUD—MATTERS OF OPINION—QUESTION FOR JURY. Notwithstanding that statements of physicians to the effect that plaintiff would probably recover in a few weeks were matters of opinion, a finding that a release was induced by fraud is a question for the jury, where there was other evidence to the effect that plaintiff was further induced by statements that the release was only a receipt for the money paid, to be applied on account in event her injuries were permanent.

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered January 7, 1913, granting a new trial after the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Reversed on plaintiff's appeal.

Walter S. Fulton and Arthur E. Griffin, for plaintiff.

James B. Howe and A. J. Falknor, for defendants.

ON REHEARING.

CROW, C. J.—A rehearing has been granted in this case, but a restatement of the issues and facts is unnecessary. The questions considered on the former hearing were (1) whether the facts were sufficient to sustain the verdict, and (2) whether the verdict, if allowed to stand, should be reduced. Our decision was against defendant's contention on both of these propositions. *Pierce v. Seattle Elec. Co.*, 78 Wash. 167, 138 Pac. 666. To these rulings we now adhere.

The plaintiff has appealed from an order granting a new trial, and the defendant has appealed from an order denying its motion for judgment notwithstanding the verdict. Both parties having appealed, we will avoid confusion by alluding to them as plaintiff and defendant. The questions to be decided at this time are, (1) whether we will consider additional assignments of error now presented for the first time by the defendant in support of its motion for a new trial, and (2) if so, whether such additional assignments disclose error of law sufficient to necessitate a new trial.

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While the appeal in this case was pending, this court in *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, announced a new rule of practice, holding that, where a new trial had been granted upon some specific ground, and the adverse party had appealed, the respondent might sustain the order by urging all the grounds covered by his motion; so that he would not thereafter be put to the necessity of further proceedings in the court below, or another appeal upon the same record. We there said:

"The correct rule of practice is now announced to be that, where, upon the consideration of a motion for new trial, the trial court enters an order granting a motion upon a specific ground or for a specific reason stated, and the adverse party appeals, the party seeking to sustain the order may urge in this court all the grounds which were covered by his motion, and is not limited to the specific ground or reason upon which the trial court based the order. A second appeal will not be entertained. However, to apply this rule to the present case would be unjust, since the practice here followed is in accordance with the previous holdings of this court. We will therefore consider this case upon its merits."

Our decision in that case was handed down on October 2, 1913. This case was first heard in this court on November 6, 1913, and was decided on February 16, 1914. Plaintiff insists that defendant should not be permitted to present additional assignments, as it had notice of the change in our rule of practice in ample time to act under it before or at the time of the original argument, or while the case was being considered by this court; that, having failed to do so, and having allowed an opinion to be filed, it cannot raise new questions by petition for rehearing or upon rehearing. Defendant proceeded in strict accord with the settled practice as it existed prior to the decision in the *Rochester* case. Counsel for the defendant frankly say that the decision had not been called to their attention at the time this case was first argued.

We are not disposed to make technical application of any rule which does not touch the substantive law of a case, especially where it has been so recently announced and there is no showing of bad faith. To bind a litigant in a given case where the court, in the same case, overlooked the fact that its changed practice might apply, might operate as a denial of justice. We would arbitrarily cut off a right which an appellant had at the time his appeal was taken. It is no answer to say that defendant did not urge its right in its former brief, or by a supplemental brief. It was not bound to do so, and is entitled to be heard now unless we are prepared to hold that it is fatal to a litigant to assume that the court will decide in its favor upon the question that is before the court. This would be to say that appeals are not prosecuted with an earnest belief that the court will decide in favor of the appellant. There may be some such appeals. If so, they are the exception and not the rule. The object of all lawsuits is to arrive at the ultimate truth and do justice. Rules are made to promote justice, not to defeat it. Nor do we think that the right to be heard should be denied under the many decisions cited, holding that the court will not consider matters urged for the first time on petition for rehearing. To so hold, would be to say that the other grounds of the motion for a new trial should have been argued in the defendant's brief, when, under the rule as it existed at the time the brief was prepared, we would not have considered them. Plaintiff's objection to hearing the additional assignments of error now predicated upon the grounds of the motion for a new trial not considered or impliedly overruled by the court below, is overruled.

Plaintiff, as a witness in her own behalf, was interrogated and testified, in part, as follows:

"Q. What business were you in in Colorado? A. I had a hair dressing establishment. Q. For how long a time did you conduct a hair dressing establishment? A. About four years. Mr. Falknor: I object to that as immaterial. By

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the Court: She has not been in that business for a great many years, has she? Mr. Griffin: No, but we will prove she was intending to go into that business here and would have done so if she hadn't been injured. By the Court: I think it is so remote as to what her business would have been at the time, she could hardly testify what she might do here. She was not familiar with conditions here. A. I was selling goods here. Q. Is that a profitable business? A. Very. Q. Before you were injured were you intending to go into that business? Mr. Falknor: I object to that as too remote and speculative. By the Court: She may go that far, state what she intended to do. A. I was going to open up a place on Third avenue. I had Messrs. West & Wheeler looking for a location for me and I was out selling goods. Q. You were out selling the goods, hair dressing goods? A. Yes, hair goods. Q. And you investigated what opportunities there were here in Seattle for a hair dressing business? A. Yes. Q. What were they? A. Very good, never better."

Defendant contends that this evidence was incompetent and prejudicial, the substance of its argument being that it amounted to a claim of damages for loss of profits in a contemplated business, and that loss of such profits cannot be shown as an element of damage. In support of this position, defendant cites *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604, 81 L. R. A. (N. S.) 991; *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605; and *Webster v. Beau*, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81, decided by this court, with additional authorities from other states. To the principle announced in these cases, plaintiff takes no exception; her position being that no evidence showing the value or extent of anticipated profits was offered or admitted. She insists that the evidence of which defendant complains was competent and admissible, not as a measure of damages for loss of profits, but as one of the elements entering into her principal case which, taken in connection with other evidence, had a tendency to show a loss of ability to work or transact business, and therefore, a resulting loss of earning capacity. The

evidence was competent as tending to show a loss of earning capacity, and as no specific statement was made of any specific amount of anticipated profits which plaintiff claimed she had lost, we fail to understand how the defendant was injured or prejudiced.

Mrs. Brier, a witness for defendant mentioned in our first opinion, during her examination in chief, testified to her recollection of what occurred at the time of the alleged settlement between plaintiff and defendant, the effect of her testimony being to show that the settlement was made in good faith and that no fraud was practiced by the defendant's agents. On her cross-examination, counsel for plaintiff sought to lay the foundation for her impeachment. With this purpose in view, he asked her if she did not have a conversation with plaintiff in the presence of plaintiff's daughter, in which she, the witness, told Mrs. Pierce "that she (Mrs. Pierce) had all the best of them because they agreed to get her well in two weeks." Mrs. Brier answered:

"A. I beg your pardon. Nothing was ever said—let me tell what was said at that conversation— A. I don't like to tell the conversation that passed. Mr. Griffin: I am laying the foundation for an impeaching question. Q. Didn't you say, the last time that you were at Mrs. Pierce's house, in effect this, in the presence of Mrs. Pierce and her daughter Margaret: 'You have all the best of them because they promised to get you well in two weeks, and you signed that paper and you didn't know what you were signing.' A. I beg your pardon, I never said such a word, and the conversation, if you want me to say it, I will tell you the conversation that passed between us, which I don't like to do."

On redirect examination, defendant's counsel asked Mrs. Brier to detail the conversation as she remembered it. To this counsel for plaintiff objected, saying:

"I simply laid the foundation for an impeaching question when I got Mrs. Pierce on the stand and her daughter; that is the reason. In fairness I asked the witness if such a conversation didn't occur and she said no such conversation took

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place. She denied any such conversation took place, and that settles it. If she admitted a portion of it took place, or some such conversation took place, then Mr. Falknor could inquire, but not when she denies it."

This objection was sustained, and upon this ruling of the trial court, the defendant now predicates one of its additional assignments of error, contending that Mrs. Brier, on her redirect examination, should have been permitted to state the full conversation to which her attention had been directed by the impeaching question. The record shows that the cross-examination above set forth was the first instance in which the alleged conversation was mentioned during the progress of the trial. No testimony had theretofore been given by plaintiff or any other witness relative to the supposed conversation. Mrs. Brier denied having made any statement such as was suggested to her by the impeaching question. At that time, no conversation calling for an explanation had been given in evidence. After the defendant rested, the plaintiff and her daughter were recalled in rebuttal, and testified on this subject. Their testimony was in substance the same, plaintiff's evidence being as follows:

"Q. You know Mrs. Brier, do you? A. I do. Q. How close to where you live does Mrs. Brier live? A. She lives in the same block. Q. I want to ask you whether or not Mrs. Brier said to you, in the presence of Margaret, at the last time or about the last time that she was at your house, 'You have all the best of them because they promised to get you well in two weeks.' A. She did. Q. 'And you signed that paper and did not know what you were signing.' A. That is what she said, she told me, she said, 'You didn't know what you were signing,' and she said, 'You have the best of them. They have got themselves in trouble and they know it.'"

This testimony given by the respective witnesses had a bearing, not only on the issue whether the settlement had been made in good faith, but also went to the credibility of Mrs. Brier. Had the plaintiff and her daughter not been recalled

as impeaching witnesses to testify to this alleged conversation, there would have been nothing in the record tending to contradict or impeach Mrs. Brier. While, in the exercise of his discretion, it might have been proper for the trial judge to have permitted Mrs. Brier on her redirect examination to give her version of the conversation mentioned in the impeaching question, there was no real necessity for pursuing such a course at that time, as Mrs. Brier could have been recalled to give her version of the conversation after plaintiff and her daughter had testified as impeaching witnesses. There is no suggestion that defendant was unable to recall her. Having failed to do so, defendant is in no position to predicate error upon the ruling whereby the trial judge excluded the redirect examination. In *Southern R. Co. v. Stewart*, 141 Ky. 270, 182 S. W. 435, a case cited by defendant, the court in the course of its opinion said:

“As the impeached witness may, as it is pointed out in the *Queen's* case, *supra*, leave the scene of the trial, and cannot then be introduced, we conclude that it is always proper to permit him, on reexamination, while on the stand, to explain the supposed contradictory statement. On the other hand, as the impeaching witness may not be introduced at all, and there may be, therefore, no necessity for explanation, we conclude that the impeached witness may be recalled and then given an opportunity to explain. In other words, the impeached witness at one stage of the proceedings or another should always be given an opportunity to explain the supposed contradictory statement.”

After the plaintiff and her daughter had been recalled, and had given their testimony relative to this conversation, had the defendant then recalled Mrs. Brier to give her version of the conversation, and had the trial court at that time rejected her evidence, we would hold that prejudicial error was committed; but to hold on the record before us that the case should be reversed, the defendant having made no effort to recall Mrs. Brier, would be the declaration of a more technical rule than we should announce, in the absence of any

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showing that for some sufficient reason Mrs. Brier could not have been recalled.

The trial judge, when defining the issues, instructed the jury in a general way that the burden of proving the affirmative defenses was upon the defendant. One of these defenses was the execution of a release which plaintiff contends was obtained by certain fraudulent representations as to the extent of her injuries, and the probable duration of her disability. Thereafter, the court fully instructed as to this defense, announcing the rule that the burden of overcoming defendant's *prima facie* case by evidence "clear, strong, satisfactory and convincing" was imposed upon the plaintiff. We have held in a line of cases too numerous to require citation that we will not reverse a case because of some technical error in the giving of instructions when it is apparent from the entire record that the jury could not have been misled. The only question for the jury on the issue involved was whether the execution and delivery of the release had been induced by fraud, and on this issue they were so specifically instructed that the burden was on the plaintiff that we are unable to conclude the jury were misled by the general instruction above mentioned.

The defendant contends that the trial court erred in submitting the question of fraudulent misrepresentations to the jury for the two reasons, first, that the whole record shows that the alleged representations of the claim agent and the company's doctor to the effect that plaintiff would probably recover in about two weeks, was no more than an expression of opinion, and second, that plaintiff's own physician, Dr. Snow, had told her that her recovery might be delayed for a considerable period of time. If the representations as to time of recovery stood alone, defendant's contention would have some merit, but when such representations are considered in connection with the fact that plaintiff and her daughter testified that the release was signed under the mistaken notion that it was only a receipt for the money then paid, and

that the sum so paid would be treated as a payment on account in the event that her injuries proved permanent, and the further fact that there was some doubt as to whether the one alleged to be plaintiff's family physician really sustained that relation, it becomes apparent that this case is not controlled by the rule announced in *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 181 Pac. 251. Dr. Snow was called in March and attended plaintiff about three times, or until he learned that she was being treated by Dr. Willis, the defendant's physician. Dr. Snow then withdrew and did not see plaintiff until July. To hold, under such circumstances, that she was bound by the opinion of Dr. Snow to the exclusion of that of Dr. Willis, and to so hold as a matter of law, would be unjust. The mere fact that plaintiff's testimony might seem improbable would not warrant us in withdrawing a disputed question of fact from the jury.

The order of the lower court granting a new trial is reversed, and the cause is remanded with instructions to enter judgment upon the verdict of the jury.

ELLIS, GOSE, PARKER, MAIN, and MORRIS, JJ., concur.

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Opinion Per PARKER, J.

[No. 11895. Department One. January 5, 1915.]

BANK OF LIND, Appellant, v. A. J. Coss et al., Respondents.¹

SHERIFFS AND CONSTABLES — ATTACHMENT — DISSOLUTION — SURRENDER OF PROPERTY—SUBSEQUENT APPEAL—EFFECT. Upon dissolution of an attachment, the sheriff is bound to return the property to the defendant, upon demand, immediately without waiting for an appeal to be taken and perfected, and is not liable to the plaintiff if, upon appeal subsequently taken, with supersedeas, the order dissolving the attachment is reversed.

SAME. The fact that the sheriff had been given an indemnity bond by the plaintiff does not put the sheriff under any obligation to hold the attached property after dissolution of the attachment.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered November 26, 1913, dismissing an action in tort, upon sustaining a demurrer to the complaint. Affirmed.

Wakefield & Witherspoon and *A. C. Shaw*, for appellant.
G. E. Lovell, for respondents.

PARKER, J.—The plaintiff, Bank of Lind, seeks recovery of damages from the defendant A. J. Coss, sheriff of Adams county, and the United States Fidelity & Guaranty Company, the surety upon his official bond, which damages it claims resulted from the unlawful release of personal property which had been seized and was being held by the defendant Coss under a writ of attachment, issued out of the superior court for Adams county at the instance and for the benefit of the plaintiff. Judgment of dismissal having been rendered in favor of the defendants, upon sustaining their demurrer to the complaint and the plaintiff's election to stand upon its complaint and not plead further, it has appealed to this court.

The controlling facts may be summarized from the complaint as follows: In October, 1911, appellant commenced

¹Reported in 145 Pac. 207.

an action in the superior court for Adams county to recover money owing to it by G. H. and L. O. Thomas, and caused a writ of attachment to be issued therein for the seizure and holding of property of the Thomases pending the action. Seizure of property under the writ was accordingly made by respondent Coss as sheriff of Adams county. Thereafter, on November 10, 1911, the Thomases appeared in the action and moved for dissolution of the attachment, which motion came on for hearing on November 22, 1911, when, the matter being submitted to the court for decision, it was by the court taken under advisement, and as alleged in the complaint, "with the understanding that the plaintiff or its counsel, whose office and place of practicing was in Spokane, Washington, a distance of about one hundred miles from the place of the sitting of said court, were to be advised immediately upon the court's decision in the matter, and that a sufficient time was to be given the plaintiff or its counsel, in event the court granted said motion, to take its appeal and file a supersedeas bond therein." Thereafter, on November 27, 1911, the court granted the motion, dissolved the attachment, and entered the order accordingly, and immediately thereafter respondent Coss, who was holding the property as sheriff under the attachment, released and surrendered possession of the property. Appellant had no actual notice of the rendering of the court's decision dissolving the attachment, or of the release of the property by respondent Coss, until about a week later. Whatever the understanding may have been as to appellant being notified upon the rendition of the court's decision on the question of dissolution of the attachment, looking to giving it an opportunity for protecting its interest by appeal and supersedeas, we are unable to gather from the complaint any facts showing that respondent Coss was a party to such understanding, or that there was any duty imposed upon him by virtue of such an understanding, whatever his duty may have been under the law aside from such understanding.

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Soon thereafter, appellant gave notice of, and perfected, its appeal to this court from the decision of the superior court dissolving the attachment, and also filed a supersedeas bond such as was sufficient to supersede that decision, in so far as the same could be superseded in view of the prior surrender of the property by respondent Coss. There is no allegation of the complaint pointing to any effort or request on the part of appellant looking to a retaking of the property by respondent Coss after its release by him in pursuance of the dissolution of the attachment by the superior court and the appeal therefrom. Thereafter judgment was rendered in the superior court upon the merits of the action in favor of appellant and against the Thomases for the amount of the debt sued upon. Thereafter, on August 16, 1912, this court reversed the decision of the superior court dissolving the attachment. *Bank of Lind v. Thomas*, 69 Wash. 700, 125 Pac. 776. Thereafter execution was duly issued looking to the collection of the judgment rendered against the Thomases, which execution was returned unsatisfied because no property of the Thomases could be found applicable to the satisfaction of the judgment. This, it is alleged, resulted from the unlawful failure of respondent Coss to hold the attached property after the dissolution of the attachment until appeal and supersedeas was perfected by appellant so as to preserve the attachment.

Was respondent Coss, as sheriff, justified by the order dissolving the attachment in immediately surrendering possession of the attached property? In view of the fact that there was no process or order of the court of any nature then in existence authorizing the holding of the property, we are constrained to hold that he was not only authorized by that order to surrender the property, but that he was bound so to do upon demand from its owner. In *Anderson v. Land*, 5 Wash. 493, 32 Pac. 107, 34 Am. St. 875, Judge Dunbar, speaking for the court touching the termination of the lien of an attachment by its dissolution, a purchaser of the

attached property from its owner pending the attachment claiming his title was perfected upon the dissolution of the attachment, as against a subsequent attachment, though the property remained in the hands of the sheriff during the interim between the dissolution of the first and the levy under the second attachment, said:

"The dissolution of the attachment on the 16th day of December ended the lien, and the owner of the property had a right to make any disposition of it he saw fit, no matter whether the property had actually been turned over to him by the officer or not. He could sell the property during the time the writ was in effect in such case, and the purchaser's title would only be subject to the right of the attaching creditor under the writ, and when the attachment was dissolved there would be an end to any such right, and the purchaser's title would be complete."

It seems to us difficult to escape the controlling force of that decision in respondents' favor here. In *Ryan Drug Co. v. Peacock*, 40 Minn. 470, 42 N. W. 298, dealing with a situation almost exactly like that here involved, Chief Justice Gillfillan, speaking for the court, there said:

"As to what is the duty of the sheriff in respect to the attached property upon the dissolution of the attachment, Drake, Attachm. § 426, states the general rule that 'the special property of the officer in the attached effects is at an end, and he is bound to restore them to the defendant, if he is still the owner of them, or, if not, to the owner.' This is certainly the logical rule, for, the writ being his only authority for keeping the property from the owner, such authority is gone when the writ is dissolved. It is true that under our practice the plaintiff may, by appealing from the order dissolving the writ and giving the bond for a stay, suspend the operation of the order, and that such suspension will relate back to the date of the order, so that, if the officer still has the property, his right to hold it is restored; and it may also be, as between the parties to the writ, that, if between the date of the order and the appeal with a stay the sheriff has returned the property to the defendant, the appeal and stay reinstate the lien so that the plaintiff may require the

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sheriff to retake the property. Neither of these, however, is this case. Here the question is, is it the duty of the sheriff to retain the property after the dissolution of the writ, which is his only warrant for holding it, to enable the plaintiff to determine whether he will appeal, and to perfect the appeal and stay, if he decides to take that course? The statute is silent on the point. If it be his duty to still hold the property, for how long must he hold it? Some authorities suggest that he should hold it for a reasonable time. But who is to determine what is a reasonable time? If that be the rule, the officer will be liable to the plaintiff in case he return the property to the defendant before the end of a reasonable time, and to the defendant in case he refuse to return it on demand after such reasonable time. The position of the officer would be a hard one if he must take the risk of the court or jury trying the action against him agreeing with him as to what is a reasonable time. We think it is for the plaintiff, and not the sheriff, to do what may be necessary to preserve the interests of the former in case of a dissolution of the writ. This he may do by procuring and serving on the officer an order directing him, in case the writ shall be dissolved, to retain the property, or staying the operation of order dissolving in case it shall be made."

Counsel for appellant cite and rely principally upon the decision of the Iowa supreme court in *Danforth, Davis & Co. v. Carter*, 4 Iowa 230, which involved the question of the preservation of the lien of an attachment, by appeal from an order of the trial court dissolving the attachment accompanied by a supersedeas, where the controversy was only between the parties to the action in which the attachment was issued; the liability of the sheriff for surrendering the property not being in any way involved. Holding that the lien of the attachment held, as between the parties to the action, the court, on page 237 said:

"It appears that on the decision of the court setting aside the attachment, and before the appeal was taken, the sheriff delivered up the attached property remaining in his hands, and the clerk paid over the money which was in his hands, to the defendant's attorney, 'taking an accountable receipt therefor.' The plaintiffs excepted to the decision of the

court, in refusing to render a judgment against the property, and to order a special execution, and appealed from the same.

"The question now is, whether the attachment still holds the property, the judgment of the court dissolving it, being reversed. We believe that the only consistent decision is, that it still holds. This court has held in this and other cases that an appeal lies from a judgment of the court, dismissing an attachment. The common effect of an appeal is to suspend the effect or operation of the judgment appealed from, if a supersedeas bond is filed, as required by law. What other object can there be in an appeal, in such a case as the present? And what exempts a judgment on an attachment from the ordinary effect of the appeal? It would seem, upon reason, that an appeal should save this, as well as any other part of a cause."

and on page 239 added,

"When the question bears upon the relations of third persons, it is manifest that the attachment may be gone, when it would not be, if viewed with reference to the two parties alone."

In the later case of *Danforth, Davis & Co. v. Rupert*, 11 Iowa 547, the court absolved the clerk of the court from liability upon his paying out money, the proceeds of a sale of perishable attached property, upon dissolution of the attachment, before appeal therefrom; the order of the trial court being thereafter appealed from and reversed. Disposing of the contention that the former decision was decisive against the clerk touching his liability, the court said:

"We do not understand that decision as determining the rights of any others than the parties to that suit. In fact the court says that no question touching the rights of third parties arises in that case, and that the question is decided without reference to such. The court, without doubt, in referring thus to third parties, must have had in view this very cause or the one against the sheriff; because the plaintiffs would, from the nature of the transaction, be compelled to resort to this remedy. We conclude that the defendant is a third party, as thus referred to by the court, and that the

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right of plaintiffs to recover, as against defendant, has not been adjudicated. . . . When an attachment is dissolved by the District Court, it is a final adjudication upon all questions involved therein, unless, in the proper time, appealed from. That appeal must be taken forthwith to continue the lien; but as between the parties, four days is a reasonable time within which to perfect such appeal.

"In determining what rule the clerk should be governed by when an attachment has been dissolved, and money deposited with him is demanded, we cannot be guided by precedents, because we are unable to find a case presenting the peculiar condition that this one does. It is true that the safest and most correct course, would be for the clerk to obtain an order of court directing him to pay over the money before so doing. Yet we cannot say that he is liable if he does pay over the money in good faith, after the attachment has been dissolved, the suit ended, and without any notice of an appeal given. Is it not the duty of the plaintiff, whose attachment has been dissolved, to be vigilant, if he desires his cause to stand in *statu quo*? The ruling is against him and he is the only one who can determine whether it is final or not. Had the plaintiffs, who were the only parties interested in having the money remain in the clerk's hands, notified him that they had appealed, and after such notice the defendant had parted with the money, he would have been liable."

Some contention is made rested upon the fact that appellant furnished respondent Coss an indemnity bond securing him, "against any damages that he might sustain by reason of the execution of said writ of attachment." We are quite unable to see that this put upon respondent Coss any obligation to hold the property after the dissolution of the attachment. There was then no longer any attachment to execute, so far as the duty of respondent Coss as sheriff was concerned. We have already noticed that there was no move made by appellant to have the attachment revived and respondent Coss retake the property.

Counsel for appellant dwell somewhat upon wrongs which they conceive as possible to flow from the conclusion we here reach. It must be remembered that the right of seizure of

property by writ of attachment under modern systems of procedure is purely statutory. 4 Cyc. 396. The doctrine which calls for our present conclusion works no greater hardship to a creditor than as if there were no attachment statutes, in which event no seizure of a defendant's property could be made until after judgment against him.

The judgment is affirmed.

Crow, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 11984. Department One. January 5, 1915.]

In the Matter of the Estate of C. W. SLOCUM.

C. W. KNOWLES, *Appellant*, v. LAURA SLOCUM, *Executrix*,
etc., *Respondent*.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—BURDEN OF PROOF. Property acquired after marriage, by either husband or wife or both, is presumed to be community property, the burden resting upon persons asserting a separate character to establish that fact by clear, certain and convincing evidence.

GIFTS—EVIDENCE. Evidence of title by gift must be clear, convincing, strong and satisfactory.

GIFTS—ESSENTIALS. To constitute a gift of personal property, there must be an intent to presently give, a subject-matter capable of delivery, and the actual delivery at the time.

GIFTS—DELIVERY—PRESUMPTION FROM POSSESSION—BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. Community property consisting of stocks, bonds and notes passed to the wife as a gift, where they were assigned by the husband to the wife, and were in her possession for twenty days prior to his death, and were kept by her in a secret place to which she alone had access; under the rule requiring actual delivery, with intent to divest present control and dominion, and that possession by an assignee of such instruments presumes a delivery.

SAME. Similar stocks and notes, made payable to the husband or wife, under the understanding that payments were to be made to the husband during life and after his death to his wife, or to either presenting the certificate, but not assigned, do not, under such cir-

¹Reported in 145 Pac. 204.

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cumstances, pass to the wife as a gift; since in the absence of an assignment, there is no evidence of intent to make a present gift, and possession is not alone sufficient to establish title.

SAME. For similar reasons, a certificate made payable to the wife, being presumptively community property, does not, under such circumstances, pass as a gift to her, since the fact of possession alone does not establish, by clear and convincing evidence, the husband's intent to make a gift; and in the absence of any assignment, delivery cannot be presumed from possession.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered October 23, 1913, upon findings in favor of an executrix, in a proceeding to compel her to include certain property in the inventory. Modified.

Miller, Crass & Wilkinson, for appellant.

Henry St. Raynor and McMaster, Hall & Drowley, for respondent.

MAIN, J.—The controversy in this case is over the question whether certain personal property should be inventoried as the community property of C. W. Slocum, deceased, and Laura Slocum, his surviving wife, or whether it was the separate property of Mrs. Slocum. The property in question had been accumulated while the Slocums were residents of Clarke county, Washington.

On December 29, 1904, C. W. Slocum executed a will, giving the use of the property belonging to him, and his community interest therein, to Laura Slocum, his wife, during her natural life, and at her death to descend to the heirs of C. W. Slocum. The latter died on September 20, 1912, and at this time was about 78 years of age. His wife was a few years his junior. The will was admitted to probate on the 7th day of October, 1912. It was what is known as a non-intervention will, and Laura Slocum, the wife, was named as executrix. After the admission of the will to probate, the executrix filed an inventory of the estate.

On December 30, 1912, C. W. Knowles, one of the heirs of C. W. Slocum, deceased, filed a petition in the probate pro-

ceeding, alleging that the executrix had omitted from the inventory filed by her certain property, a part of which is the property in dispute in this case, and asked that she be required to include the same in the inventory as part of the community property of the estate of C. W. Slocum, deceased. To the petition, an answer was filed, setting forth the claim that the property had been given to Mrs. Slocum by her husband about 20 days previous to his death, and that, by reason of such gift, became her separate property. Upon the issues framed, the case proceeded to trial. The trial court found a portion of the property in dispute to be community property, and a portion to be the separate property of Mrs. Slocum. From the judgment entered, C. W. Knowles, the petitioner, appealed. Mrs. Slocum did not appeal.

The property here in controversy, then, is the property which was by the trial court adjudged to be the separate property of Mrs. Slocum. It is as follows: Certificate for 50 shares of stock of the par value of \$100 per share, in the Donegan Shoe Company, a corporation; certificate in the Equitable Savings & Loan Association, of Portland, Oregon, for \$2,000, dated September 17, 1912; certificate in the same company for \$3,000, issued December 20, 1910; certificate in the same company for \$8,000, dated May 16, 1911; certificate in the same company for \$3,000, dated August 17, 1912; certificate in the same company for \$4,000, dated October 21, 1911; certificate in the same company for \$5,000, dated February 14, 1912; also a certificate in the Realty Associates, of Portland, Oregon, for \$10,000, dated April 22, 1909. In addition to this, there were two notes, one for \$200, and the other for \$2,500. Further reference to the facts and the evidence will be made when the items of property specified are hereinafter considered more in detail.

There appears to be no conflict in the evidence. Hence, it will not be necessary to review the findings of the trial court. The sole question in this case is whether the title to the property in dispute vested in Mrs. Slocum as her sole and separate

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property at the time of the death of her husband, C. W. Slocum. If the property in question had become her separate property at that time, then the judgment of the superior court must be affirmed. If some or all of it had not taken on the character of her separate property, then the judgment must be either reversed or modified. Owing to the numerous items of property involved, a statement of the rules of law which are pertinent to the inquiry will first be made.

In this state all property acquired after marriage by either the husband or the wife, or both, is community property, other than certain well known exceptions which are specified in the statute. Rem. & Bal. Code, §§ 5915 to 5917 inclusive (P. C. 95 §§ 25, 27). Property acquired during the existence of the marriage relation, whether the title thereto be taken in the name of the husband or that of the wife, or in their joint names, is presumed to be community property. 21 Cyc. 1651. This is a rule so well known and so generally established that it is not necessary to assemble the cases in support of the text cited.

Where the claim is made that property acquired after marriage is not community property, the burden rests with the parties claiming the separate character of the property. The presumption as to the community character of the property may be overthrown only by evidence of a clear, certain, and convincing character. *In re Boody's Estate*, 113 Cal. 682, 45 Pac. 858; *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734, 82 Am. St. 361.

In order to constitute a gift of personal property, three things are necessary: (a) An intention on the part of the donor to presently give; (b) a subject-matter capable of passing by delivery; and (c) an actual delivery at the time. *Hecht v. Schaffer*, 15 Wyo. 34, 85 Pac. 1056; *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857; *Meyers v. Albert*, 76 Wash. 218, 135 Pac. 1008. The delivery must be such as will divest the donor of the present control and dominion

over the property absolutely and irrevocably and confer upon the donee the dominion and control. *Basket v. Hassell*, 107 U. S. 602. The distinction that exists between gifts *inter vivos* and gifts *causa mortis* need not here be defined. The pivotal facts which give caste to the various transactions in the present case are the same, whether the gifts or attempted gifts be considered *inter vivos* or *causa mortis*. A gift will not be presumed, but he who asserts title by this means must prove it by evidence which is clear, convincing, strong and satisfactory. In *Jackson v. Lamar*, *supra*, it was said:

"While it is true the courts have relaxed the rigor of the old rules, they have never departed from holding that something more is required to constitute a gift, either *inter vivos* or *causa mortis*, than the expression of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery, either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. Although it may not be true that the law now presumes against a gift, it certainly does not presume in its favor, but requires proof."

From the possession of a note, bond, or deed by an endorsee, assignee, payee or grantee, a delivery will be presumed. *Sharmer v. Johnson*, 43 Neb. 509, 61 N. W. 727; *Castor v. Peterson*, 2 Wash. 204, 26 Pac. 223, 26 Am. St. 854; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; *Kauffman v. Baillie*, 46 Wash. 248, 89 Pac. 548. A mere passage of the naked possession, however, to one other than the payee or grantee, and to whom it has not been assigned or endorsed, does not meet the requirements of a good delivery. *Sharmer v. Johnson*, *supra*.

From the testimony of Mrs. Slocum, it appears that, at the time of Mr. Slocum's death, the items of property above mentioned were in her possession, and had been in her possession for about 20 days. They were in a private drawer

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with her own private papers. This private place had been used by her for about three years. No one else had the papers after they came into her possession. The possession was with the knowledge of Mr. Slocum. The latter died at home, and prior to that time he and his wife lived together as husband and wife. The drawer in which the papers were kept after they came into the possession of Mrs. Slocum was in a cupboard in the bedroom downstairs in the house occupied by them.

From the testimony of the maker of one of the notes, it appears that the understanding was that, while the notes were made payable to C. W. Slocum or Laura Slocum, during the lifetime of Mr. Slocum payments were to be made to him; but after his death, to his wife. From the testimony of the assistant secretary of the Equitable Savings & Loan Association, with whom the transactions were had with reference to the purchase of the stock in that company, it appears that, while certain of the shares of stock were placed in the name of C. W. Slocum or Laura Slocum, the understanding was that, during the lifetime of both of them, the payments that might accrue would be made to either presenting the certificate. The evidence as it has just been stated is taken substantially from the appellant's abstract. There being no supplemental abstract filed, the abstract of the appellant is recognized as correct.

The items of property in controversy may be divided into three classes. The first class includes stock certificates in various corporations which were issued to C. W. Slocum, or to C. W. Slocum or Laura Slocum, and assigned by C. W. Slocum to Laura Slocum. The stock included in this class is as follows: 50 shares Donegan Shoe Company, par value \$5,000; 30 shares Equitable Savings & Loan Association, \$3,000; 40 shares Equitable Savings & Loan Association, \$4,000; 50 shares Equitable Savings & Loan Association, \$5,000; and a profit sharing bond in the Realty Associates of Portland, a corporation, \$10,000. The Donegan Shoe

Company stock, on April 4, 1910, was assigned by C. W. Slocum to Laura Slocum, his wife, and "became her sole and separate property." The 30 shares of Equitable Savings & Loan Association stock was issued to C. W. Slocum on December 20, 1910, and were by him assigned to Laura Slocum on December 26, 1910. The 40 shares of Equitable Savings & Loan Association stock on October 21, 1911, were issued to C. W. Slocum or Laura Slocum, and were assigned to Laura Slocum. The 50 shares of Equitable Savings & Loan Association stock was issued to C. W. Slocum or Laura Slocum on February 14, 1912, and were assigned to Laura Slocum on February 20, 1912. The Realty Associates profit sharing bond for \$10,000 was issued to C. W. Slocum on April 22, 1909, and was assigned to Laura Slocum on June 22, 1909. All of these items of property, it will be seen, were assigned by C. W. Slocum during his lifetime to his wife Laura Slocum. They were in Mrs. Slocum's possession for 20 days prior to the death of her husband. They were in a place, as she testified, which no one knew about but herself, and to which no one but herself had access. Under the rules of law above stated, we think the title to this property had passed to Mrs. Slocum as her sole and separate property prior to the death of her husband.

The second class of the property in controversy includes certificates of stock and promissory notes made payable to C. W. Slocum or Laura Slocum, and which were not assigned. These include 20 shares of stock in the Equitable Savings & Loan Association of the par value of \$2,000; 30 shares of the Equitable Savings & Loan Association of the par value of \$3,000; a note for \$200; and a note for \$2,500. The possession of these items was the same as in class one. The evidence, as already indicated, showed that the reason for having the notes and stock made payable to C. W. Slocum or Laura Slocum was so that, during their lifetime, payments might be made to either. In the absence of an assignment, there is no evidence that, as to this class of property, C. W. Slocum

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intended to make a present gift to his wife. On the contrary, the evidence is that the dominion and control had not passed from him to her. Possession alone was not sufficient to establish title. It is true that, at the time the certificate for 80 shares in the Equitable Savings & Loan Association was issued, Mr. Slocum said to his wife, "Laura, here is another certificate for you." But giving effect to the evidence of the assistant secretary with whom the transaction occurred, it is evident that the husband did not intend by that act to presently give and surrender the dominion and control of that certificate absolutely to his wife.

In the third class, is a certificate issued to Laura Slocum for 80 shares in the Equitable Savings & Loan Association, of the par value of \$8,000. This certificate was dated May 16, 1911, and bears no assignment. That it was community property when issued, cannot be well denied. It being community property, in order to change its character to that of separate property, would require evidence, according to the rule above stated, which is clear and convincing. If it became separate property, it must have been by reason of the donation by the husband of his community interest therein. To establish a gift, it is necessary that the evidence be clear and convincing, strong and satisfactory. The only evidence which supports a gift of this certificate is the fact of possession. This is not sufficient. Had the husband survived and asserted title to this certificate as community property, could his claim with any show of reason be denied? This class of property does not fall within the rule that delivery will be presumed from possession by the indorsee, assignee, payee or grantee. Mr. Slocum, relative to this certificate, had performed no act as indorser, assignor, or grantor.

The cause will be remanded to the superior court with direction to enter a judgment directing that the property specified in what we have denominated classes two and three be included in the inventory as community property.

CROW, C. J., ELLIS, GOSÉ, and CHADWICK, JJ., concur.

[No. 12008. Department Two. January 5, 1915.]

PORT OF SEATTLE, *Respondent*, v. YESLER ESTATE *et al.*,
Appellants.¹

EMINENT DOMAIN—TITLE ACQUIRED—WHEN PASSES—STATUTES. The title to the property condemned does not pass until the payment into court of the damages awarded, under Rem. & Bal. Code, § 7784, providing that upon proof that damages awarded had been paid . . . into court . . . the court shall enter an order that the condemnner shall have the right to take possession of the property "and thereupon the title to any property so taken shall vest in fee simple in such city or town."

TAXATION—ASSESSMENT—LIEN—WHEN ATTACHES—GRANTOR AND GRANTEE. Where an award of damages in eminent domain proceedings was made on January 17, and judgment was entered for the same January 21, but the damages were not paid into court until February 20, so that the title did not pass until February 20, the taxes assessed for the previous year became a lien on the property, as between the parties, on February 3d, under Rem. & Bal. Code, § 9235, making taxes a lien on real estate from March 1st in the year in which they are levied, and providing that, as between grantor and grantee, the lien shall not attach until the first Monday of the following February.

EMINENT DOMAIN—TITLE ACQUIRED—WHEN PASSES—STIPULATIONS—PAYMENT OF AWARD—RELATION. Where, in eminent domain proceedings, pursuant to a stipulation, an award of damages was made January 17, and judgment thereon was entered January 21, but the award of damages was not paid into court until February 20 (the lien for taxes thereby attaching on February 3d before the title passed), the payment of the award does not relate back to the 17th day of January, as between the parties, by reason of provisions in the stipulation authorizing the award of damages to the effect that out of the award shall be paid all liens, including taxes, which may be adjudged valid liens "as of this date," the amount of such liens to be retained out of the award until finally determined.

SAME—PASSING OF TITLE—AWARD IN COURT—IMPRESSED WITH TAX LIEN. Where the title to land condemned did not pass to the condemning municipality until after February 3d, when, as between grantor and grantee, the general taxes for the preceding year became a lien upon the land, so that the land itself could not be reached in the collection of the taxes, the award paid into court should be impressed with a lien for the taxes, attached to the land as against the condemnnee as owner.

¹Reported in 145 Pac. 209.

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Appeal from a judgment of the superior court for King county, Albertson, J., entered February 17, 1914, upon findings in favor of a claimant to funds paid into court upon a condemnation award, after a trial to the court. Affirmed.

Bronson & Robinson and *Hughes, McMicken, Dovell & Ramsey*, for appellants.

John F. Murphy and *Samuel Morrison*, for respondent.

Crow, C. J.—In May, 1912, the Port of Seattle, a municipal corporation, hereinafter called the Port, filed, as plaintiff, in the superior court of King county, its petition in eminent domain against Yesler Estate, incorporated, Joshua Green, Laura T. Green, his wife, the county of King, and other defendants, to condemn lots 1 and 2, in block 272, Seattle tide lands belonging to the Yesler Estate, and lots 3, 4, 5, 6 and 7, in the same block, belonging to Joshua Green and wife. The Port intended to pay for these lots from the proceeds of certain bonds which it was authorized to issue, but considerable delay occurred in the sale of the bonds which caused a like delay in the condemnation proceeding. On or about January 3, 1913, the Port negotiated a sale of its bonds, payment of \$500,000 to be made as soon as they were ready for delivery and approved by attorneys in New York City. An order was entered adjudging a public use, and the question of damages was, by the consent of all the parties, submitted to the court for trial sitting without a jury. On January 17, 1913, the date of the trial, a stipulation, to which King county was not a party, was entered into between the Port, the Yesler Estate, and Joshua Green and wife, reading as follows:

“It is hereby stipulated by and between the Port of Seattle, Yesler Estate, Incorporated, and Joshua Green and Laura T. Green, his wife, parties to the above entitled action, by their respective attorneys, that the condemnation judgment to be entered in the above entitled cause shall provide that the amount fixed in the verdict of the jury, or the find-

ings of the Court, shall not bear interest during the period of sixty (60) days following the rendition of said verdict or findings, and that the plaintiff shall not be required to pay interest during the said period, provided that plaintiff pay such judgment forthwith upon the receipt of the proceeds of the sale of its first Million Dollar issue of bonds.

"It is further stipulated that out of said judgment award all liens of every kind and nature upon said property, including general or special taxes, which may be adjudged valid liens as of this date, shall be paid, it being understood that the amount of any such lien, or liens, asserted by any person, corporation or municipality may be determined by the court, and pending such determination of such lien or liens, shall be retained in the registry of the court to be paid out in accordance with the final judgment of the court, or of the Supreme Court in case of appeal."

After hearing the evidence, the court made findings of fact and awarded damages as the value of the lots in the sum of \$120,000 for the lots owned by the Yesler Estate, and in the sum of \$280,000 for the lots owned by Joshua Green and wife. On January 21, 1913, a subsequent stipulation, to which King county was not a party, was entered into between the Port, the Yesler Estate, and Joshua Green and wife, reading as follows:

"It is hereby stipulated and agreed by and between the parties hereto that, in the stipulation made and filed at the time of the trial thereof on January 17, 1913, it was the purpose and intention of the parties hereto to provide that, if the tax for the year 1912 were held to be a lien upon the property appropriated in the hands of plaintiff which plaintiff would be required to pay, the amount of such tax should then be paid out of the said judgment award, but not otherwise."

In pursuance of the award and these stipulations, a judgment was signed and entered on January 21, 1913, awarding the damages, which judgment in part provided:

"It is further considered, ordered, adjudged and decreed by the court that said awards shall not bear interest during the period of sixty days from the 17th day of January, 1913, and that the plaintiff shall not be required to pay interest

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during said period; provided, that the plaintiff shall pay said awards into court as soon as it receives the proceeds of the sale of the first million dollar issue of bonds of said Port of Seattle.

"It is further considered, ordered, adjudged and decreed that out of the said awards there shall be paid all liens of every kind and nature upon said property, including special assessments and general taxes which may be adjudged valid liens against said property in the hands of plaintiff as of date of January 17, 1913.

"It is further considered, ordered, adjudged and decreed that upon the payment into the registry of this court of said awards and the costs of these proceedings taxed in favor of said respondents, the title to the property herein described shall be vested in fee simple in the Port of Seattle, and said Port of Seattle shall be entitled to the immediate possession thereof."

The Port experienced further delay in the sale of its bonds, with the result that the awards were not paid into court until February 20, 1913. It is conceded that general taxes and certain special assessments, payable to King county, had been levied and assessed on the condemned lots for the year 1912. After the awards had been paid into court, the Yesler Estate and Green and wife, withdrew the respective amounts due them, less \$1,504.52 taxes and assessments on the Yesler Estate, and less \$3,195.48 taxes and \$217 assessments on the Green lots, which sums were permitted to remain in the registry of the court subject to further litigation.

Thereafter, the Yesler Estate and Green and wife filed in the condemnation case, and served upon King county, their respective petitions claiming the residue of the awards then remaining in the registry of the court. King county, by answer, demanded payment of the funds to the county treasurer in satisfaction of the 1912 taxes and special assessments which had been levied on the lots. The trial court made findings of fact and conclusions of law, upon which a final judgment was entered, directing payment of the taxes and assess-

ments to King county. The Yesler Estate and Green and wife have appealed.

It will be noticed that the award of damages for the value of the lots condemned was made on January 17, 1913; that judgment for the same was entered on January 21, 1913, but that the damages were not paid until February 20, 1913. Under Rem. & Bal. Code, § 9235 (P. C. 501 § 215), taxes become a lien upon real estate from and including the 1st day of March in the year in which they are levied until paid, but as between grantor and grantee, such lien shall not attach until the first Monday of February of the succeeding year, which in this instance would be February 3, 1913. The controlling question in this case seems to be whether the title which the Port obtained to the lots passed to it on February 20, 1913, the day upon which the awards were finally paid, or whether, upon the payment of the awards, the passing of the title, in pursuance of the judgment and stipulations, related back to January 17, 1913. The further questions are presented, whether, at the time title passed, the taxes were a lien upon the real estate, and if so, whether the damages awarded were, in lieu of the lots, impressed with a lien in favor of King county for the satisfaction of such taxes.

Appellants insist that, by the judgment and decree of January 21, 1913, which they say was invited by the stipulations, the Port was required to take the property and pay the awards immediately upon receiving the proceeds of the sale of its bonds; that the payment of the awards on February 20, 1913, related back to January 17, 1913, the date of the findings and awards made in the condemnation proceedings; that, by relation, the title vested in the Port as of the later date, and that no taxes were to be paid out of the awards, except such as were adjudged valid liens on the lots in the hands of the Port as of the date of January 17, 1913.

The vital question presented for our consideration, is whether the title passed to the Port on February 20, 1913, the day on which it paid the awards. It would seem that this

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question is answered in the affirmative by Rem. & Bal. Code, § 7784 (P. C. 171 § 68), a section of the eminent domain act pertaining to municipal corporations. *In re Twelfth Avenue South*, 74 Wash. 132, 132 Pac. 868. The section cited provides that,

"The court, upon proof that just compensation so found by the jury, or by the court in case the jury is waived, together with costs, has been paid to the person entitled thereto, or has been paid into court as directed by the court, shall enter an order that the city or town shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court as aforesaid, *and thereupon, the title to any property so taken shall be vested in fee simple in such city or town.*" Rem. & Bal. Code, § 7784 (P. C. 171 § 68).

Appellants, however, insist that, by reason of the stipulations of the parties and the terms of the judgment, the payments when made related back to January 17, 1913, which caused the transfer of the title to relate back to that date. In support of this contention, they cite *North Coast R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856, quoting certain expressions therefrom which standing alone would appear to lend some force to their argument. In the *Gentry* case, there had been two trials awarding damages in condemnation proceedings. From the judgment entered on the award made at the first trial, the property owners appealed to this court, and secured a reversal which necessitated a second trial. Immediately after the first trial, the railroad company paid into court the damages awarded, thereby electing to take the property. Had the judgment entered therein been affirmed, the title would undoubtedly have passed as of the date of the payment, and a like result would follow upon the payment of any additional damages that might have been thereafter awarded. Pending the appeal, the railroad company withdrew the award from the registry of the court. On the second trial a larger award was made. Payment of this award

into court was made by the railroad company, which payment continued its election to take the property. Later the railroad company commenced an action to require the former owners to pay certain taxes which had become a lien on the real estate after payment of the first award, but prior to the payment of the second award; its theory being that under the statute the title finally passed on the date of its payment of the second award. After reviewing several sections of the eminent domain act under which the condemnation had been made, we held that, when the railroad company paid the first award, it elected to take the property; that without authority it had wrongfully withdrawn its payment pending the first appeal, and that, when it made a payment of the second award and continued its election to take the property, the title which it then obtained related back to the date of its payment of the first award. In so holding, we used the following language on which appellants now rely:

"If in the case before us, on the original appeal there had been an affirmance of the original judgment for damages, the right of abandonment so suspended by payment of the award into court would have been forever lost, and the respondent's title would have related to the date of the original judgment and decree of appropriation, not to the date of affirmance."

It is apparent that the decision cited has no application to the facts now before us. No payment of an award was made by the Port at any time prior to February 20, 1913, and under § 7784, *supra*, the title passed at that time. There is no sufficient reason for holding that it related back to January 17, 1913. The judgment, as above quoted, contemplates that the title would not pass until the award was paid. It in effect so provided. It is apparent that, as against appellants, the taxes in question became a lien upon the property on February 3, 1913, prior to the date on which the title passed.

In *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, it was held that taxes definitely assessed and actually delinquent, could not be collected by a sale of

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land upon which they were a lien after title thereto had been acquired by a municipality in the exercise of its sovereign right of eminent domain. That case, however, is consistent with the idea that although after such condemnation the land itself, while owned by the municipality, could not be reached in the collection of the outstanding and delinquent taxes, the award of damages, when paid into the registry of the court, by the condemning municipal corporation, could be subjected to tax liens, which were payable at the date of the transfer of title to the municipality in the condemnation proceeding, and this course of procedure seems to have been contemplated by the terms of the stipulations, and the provisions of the judgment in this action. Title to the lots having passed on February 20, 1913, after the taxes had become a lien as between grantor and grantee, it would seem to follow that the money paid into court by the condemning corporation should be impressed with a lien for the collection of such taxes, as was done in this case.

There seems to be some contention on the part of appellants that the county, by stipulation, waived its right to a lien upon the fund in question. A reading of its stipulation, in the light of the circumstances and history of the case, shows that its only purpose was to permit the appellants to draw down the award due them, less the taxes involved, the right to which could be thereafter litigated. The county not being a party to the stipulations entered into between appellants and the Port, was not bound thereby.

Our conclusion from the entire record is that the title passed on February 20, 1913; that the taxes were then a lien upon the real estate; that they could not be enforced against land owned by the municipal corporation, and that the trial court properly held them to be a lien upon the awards when paid into court, and properly directed their payment therefrom.

The judgment is affirmed.

MOUNT, FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 12062. Department One. January 5, 1915.]

MORRIS LEBOVITZ *et al.*, Respondents, v. THEODORE
COGSWELL *et al.*, Appellants.¹

ACTIONS—MISJOINDER OF PARTIES—COMMON INTEREST IN CAUSE. Plaintiffs have a common interest in a cause of action for fraud, under Rem. & Bal. Code, § 189, providing for joinder of plaintiffs in such case, and there is no misjoinder of parties, where they were induced by one of the defendants to take an interest in three sections of timber lands, each taking title to one of the sections and holding as tenants in common; Id., § 406, providing that judgment may be given for or against one or more of the several plaintiffs and for or against one or more of the several defendants.

APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY—CERTIFICATE. The sufficiency of the evidence to support the verdict cannot be considered in the absence of a properly certified statement of facts; and it is not sufficient to certify that the matters and proceedings embodied in the bill are matters and proceedings occurring in the cause, and that the attached exhibits were all the exhibits "admitted upon the trial of said cause."

TRIAL—VERDICT—SEVERAL VERDICTS. In an action by plaintiffs having a common interest in a cause of action for damages for fraudulent representations, the jury may be instructed to return a several verdict as to each plaintiff, under Rem. & Bal. Code, § 364, authorizing the courts to direct special verdicts or findings upon particular facts.

APPEAL—REVIEW—HARMLESS ERROR. Any error in directing several verdicts for two plaintiffs instead of a joint verdict for the aggregate sum, is harmless.

APPEAL—RECORD—AFFIDAVITS. Affidavits upon a motion for a new trial cannot be considered unless included in the statement of facts.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 1, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

John T. Casey, for appellants.

Geo. B. Cole and *John Wesley Dolby*, for respondents.

¹Reported in 145 Pac. 212.

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Gose, J.—This is an action to recover damages because of fraud which it is alleged was practiced upon the plaintiffs by the defendants in the sale of three sections of timber land. There was a verdict and judgment in favor of the plaintiffs against the defendants Theodore Cogswell and P. H. Casey. The action was dismissed as to all other defendants. Cogswell and Casey have appealed, and will hereafter be referred to as the appellants.

As constituting the fraud, it is alleged, that the appellants agreed between themselves to, and did, represent to the respondents that each of the three sections of timber land contained at least fifteen million feet of good, merchantable timber; that, in furtherance of the fraud, the appellant Casey took the respondent Lebovitz into a timbered section and pointed out to him certain heavily timbered land which he (Casey) represented to be one of the sections; that he told Lebovitz he was well acquainted with the other two sections, and that each thereof contained as much as or more timber than the section shown; that he represented to Lebovitz that none of said timber was situated to exceed two miles from a railroad, and that it could be easily logged and marketed; that the land purchased and the whole thereof was without value and devoid of merchantable timber, which the respondents well knew; that the land shown to the respondent Lebovitz by the appellant Casey was not a part of the land purchased; that the respondents were not familiar with timber lands or their value; that they relied upon and believed the representations made to them by the appellants; that Lebovitz paid to appellant Cogswell upon the purchase price \$4,200; that Kronfield paid him the sum of \$4,548; that the appellant Casey represented to the respondents, and induced them to believe, that he was paying to Cogswell the sum of \$4,368, but that in truth and in fact he did not pay that sum or any sum whatever; that, upon the making of such payments by the respondents, the land was conveyed to the respondents and Casey; that they agreed in writing that Lebovitz should

own an undivided interest in the land to the extent of 600 acres, that Kronfield should own an undivided interest to the extent of 640 acres, and that Casey should own an undivided interest to the extent of 624 acres; and that the property, if it had been as represented by the appellants, would have been of the reasonable value of \$60,000.

The case comes to us upon a transcript and a bill of exceptions. The judge who tried the cause certified "that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein," and that certain identified exhibits attached to the bill of exceptions were all the exhibits "admitted upon the trial of said cause." The land was conveyed to "Morris Lebovitz, Herman Kronfield, and Patrick Casey" by three warranty deeds. One of these deeds conveyed section 5, another conveyed section 7, and the other conveyed section 15, to the parties as above named.

At the close of respondents' evidence, the appellants moved for a nonsuit, on the ground (1) that there was a misjoinder of plaintiffs, that the action was joint, and that the evidence showed, if there was any cause of action for damages, it was a several cause of action in favor of each of the plaintiffs; (2) insufficiency of the evidence to support the verdict.

The first error assigned is that the respondents cannot jointly prosecute the action. Our statute, Rem. & Bal. Code, § 189 (P. C. 81 § 27), provides that those having a common interest in a cause of action shall be joined as plaintiffs. Section 406, Rem. & Bal. Code (P. C. 81 § 745), provides that judgment may be given for or against one or more of several plaintiffs and for or against one or more of the several defendants. We think the respondents have a common interest in the cause of action within the meaning of the statute. *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812.

In that case, a husband and wife and a third party brought an action to recover the possession of real estate and to quiet

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title. They alleged that the defendant wrongfully entered into the possession of the land, that he wrongfully held it and claimed some interest therein which was unfounded and without right. It was urged that the plaintiffs did not own the premises in dispute "by unity of title, and that they had no common right to maintain the action." The court held that the several rights of action arose from a common cause, were governed by the same legal rule, and that the whole matter could be settled in a single suit. It does not appear in that case whether the plaintiffs had acquired title by one instrument or more, nor does it appear whether the third party acquired his interest in the property at the same time that the husband and wife acquired their title, or by the same instrument. In the instant case, the land was conveyed to the three parties as tenants in common. It is true that the respondents did not each contribute the same amount of money in the purchase of the property. The statute, however, does not require that the interests of the plaintiffs shall be equal, but that there shall be a common interest in the cause of action.

The appellants cite in support of this contention *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428, and *Johnson v. Seattle Elec. Co.*, 39 Wash. 211, 81 Pac. 705. In the *Utterback* case, there were thirteen plaintiffs, each claiming to be lawfully in possession of distinct and different pieces of land, consisting of town lots in different additions to the town of Puyallup. Some of the plaintiffs had merely individual contracts of purchase. Other plaintiffs claimed in virtue of deeds of general warranty by which each held in severalty several distinct parcels of land. The action was brought to remove a cloud upon the titles of the several plaintiffs. The defendants demurred to the complaint upon the ground, among others, that several causes of action had been improperly united. In addressing itself to these facts, the court said:

"Briefly stated, what is attempted here is to unite in one action several distinct and separate causes of action existing

in favor of distinct parties, whose interests are several, and neither of whom has any interest in the cause of the others."

In the *Johnson* case, a surviving husband and minor son of the deceased jointly brought an action to recover damages on account of the death of the wife and mother. It was held that the husband had no cause of action for the loss of his wife; that he was entitled to recover the amount he had paid for funeral expenses, but that he could not join his cause of action with the action on behalf of the minor child for the loss of the mother. The two causes of action were distinct, one in favor of the husband against the party who had negligently caused the death of his wife, for funeral expenses which he had paid; the other the statutory action of the minor child for the loss of the mother. It is obvious that there was nothing in common between the two causes of action.

It is argued that the evidence does not support the verdict. That question we cannot consider, in the absence of a properly certified statement of facts. *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 78 Wash. 651, 139 Pac. 605; *Powers v. Washington Portland Cement Co.*, 79 Wash. 1, 139 Pac. 615; *Agens v. Powell*, 79 Wash. 131, 139 Pac. 873; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691.

The jury was instructed to, and did, return a several verdict in favor of each of the respondents. This is assigned as error. We think the practice followed by the court was warranted by the provisions of Rem. & Bal. Code, § 364 (P. C. 81 § 635). In any event, if it was error, it was technical error and without prejudice to the appellants. It could make no difference to the appellants whether the verdicts were several, or whether there was a joint verdict in favor of the respondents for the aggregate amount of the two verdicts.

It is argued that the court erred in denying the appellants' motion for a new trial. It is said that this was error because of matter contained in the affidavit of two jurors. The

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affidavit appears only in the clerk's transcript. Under the authorities cited, the affidavit cannot be considered. In *Powers v. Washington Portland Cement Co.*, we said:

"The affidavits which were filed in support of this motion were brought to this court in the clerk's transcript, and are not included in the statement of facts certified by the trial judge. Under the doctrine frequently announced in the decisions of this court, they cannot be here considered. It has repeatedly been held that affidavits which were used during the progress of the trial in the superior court to establish or dispute a fact, cannot be considered unless they are included in the statement of facts or bill of exceptions, and by certificate of the trial judge made a part of the record;"

citing numerous cases from this court. In the case at bar, the affidavit is not included in the statement of facts, nor is it referred to in the certificate of the trial judge. It is not even referred to in the motion for a new trial. The record is silent as to whether the affidavit was called to the attention of the court. It is not referred to in the judgment overruling the motions for a new trial.

Other errors assigned which go to the merits upon the evidence cannot be considered, in the absence of all the evidence which was submitted to the jury and which influenced the court in entering a judgment upon the verdicts. The judgment is affirmed.

Crow, C. J., CHADWICK, PARKER, and MORRIS, JJ., concur.

[No. 12178. Department Two. January 5, 1915.]

H. M. KOONTZ *et al.*, *Appellants*, v. SOPHIA C. KOONTZ,
Respondent.¹

WILLS — REVOCATION — MARRIAGE — PROVISION FOR WIFE. Under Rem. & Bal. Code, § 1323, providing that marriage revokes a prior will of the testator, if the wife shall be living at the time of his death, unless provision shall have been made for her by marriage settlement or the wife be provided for or mentioned in the will, an understanding before marriage that, when either should die, the survivor should have no interest in the decedent's estate, is not a "provision" for the wife by marriage settlement which could toll the revocation of the will.

FRAUDS, STATUTE OF—CONTRACTS IN CONSIDERATION OF MARRIAGE. An understanding before marriage that, when either should die, the survivor should have no interest in the decedent's estate, is not merely an agreement in contemplation of marriage, but is a promise made "upon consideration of marriage," and void under Rem. & Bal. Code, § 5289, unless made in writing.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 10, 1914, upon findings in favor of the defendant, denying the admission of a will to probate. Affirmed.

G. W. Sommer and A. J. Laughon, for appellants.

Charles A. O'Connor and Hubert P. Sving, for respondent.

ELLIS, J.—This is an appeal from a decree of the superior court of Spokane county, in probate, denying admission of a will to probate on the ground that it had been revoked by the marriage of the maker subsequent to its execution.

The following facts are not disputed. On January 3, 1911, the deceased, Joseph N. Koontz, made a will bequeathing and devising all of his property to the appellants, his two sons. He was then a widower. On December 15, 1912, he married the respondent, who was a widow. It was admitted in argument that both were then well advanced in

¹Reported in 145 Pac. 201.

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years. He then owned real estate worth about \$3,000, and had between \$3,000 and \$4,000, in money. She owned a home worth between \$3,000 and \$4,000. They lived together as husband and wife until his death on January 29, 1914. In the will of January 3, 1911, the deceased made no provision for, nor any mention of the respondent, nor did he ever make any other will or codicil.

The appellants sought to show, by the parol testimony of several relatives and friends, that the deceased had at different times stated, but not in the presence or hearing of the respondent, that he and the respondent, prior to their marriage, had an express understanding that, when either should die, the survivor should have no interest in the decedent's estate. This evidence was admitted subject to the objections of respondent that such an agreement was, under the statute of frauds, void unless in writing, and that no written evidence of such an agreement had been offered. No proof of any such agreement in writing was ever offered. The respondent testified that neither before nor after the marriage did she and the deceased enter into any contract or agreement in writing settling their property rights as between themselves. She was not asked nor did she say whether any such verbal agreement was made or not. There was evidence that the deceased held a mortgage on the home of the respondent securing a note for the sum of \$750. This mortgage and note, with an assignment from the deceased to the respondent, written upon the back of the note, was found in a tin box in which the deceased had kept his private papers. Neither of these instruments is in evidence and it does not clearly appear when they were executed. There is an inference, however, that both were executed subsequent to the marriage, since it appears that the mortgage was made to take up a prior debt secured by a mortgage upon the respondent's home which the deceased paid.

At the close of the hearing, the court ruled out all of the oral testimony touching the alleged antenuptial agreement,

and found, in substance, the foregoing admitted facts and further, "that said deceased did not at any time make provision for the said Sophia C. Koontz, his widow, by marriage settlement or in any other manner." The appellant excepted to the latter finding. The court concludes, as a matter of law, that the will of the deceased was revoked by the marriage to Sophia C. Koontz who survived him, and hence was not entitled to admission to probate. The decree went accordingly.

The making of the above quoted finding and the conclusions of law and the decree based thereon are assigned as error.

We think the decree should be sustained for two reasons, (1) because, even conceding the validity of the alleged antenuptial agreement, it made no provision for the widow; (2) because the alleged agreement rested in parol and was void under the statute of frauds. Both questions are new ones in this state. We shall therefore consider them with some care.

I. The statute relative to revocation, Rem. & Bal. Code, § 1323 (P. C. 409 § 35), is as follows:

"If, after making any will, the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage settlement, or unless she be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received."

Touching the question here involved, there is no ambiguity in this statute. Its terms are clear and explicit. We must assume that it means what it says. In *In re Adler's Estate*, 52 Wash. 539, 100 Pac. 1019, a case mistakenly relied upon by the appellants, we said, touching this statute:

"When the legislature has assumed to speak upon a given subject, courts must take its expression as it is, and if it be certain in its terms, there is no reason for speculation as to

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its reasons, nor warrant for adding anything to meet a given case."

In that case we also held that the several contingencies tolling the revocation are stated in the statute disjunctively, as they clearly are, and must be so applied. The statute says, such will shall be deemed revoked, unless *provision* shall have been made *for her* by marriage settlement, or unless she be provided for in the will, or in some way mentioned *therein* as to show an intention not to make such provision, and *no other evidence to rebut the presumption of revocation shall be received*. Clearly evidence *aliunde* the will itself, of an intention not to make any provision for her, would be inadmissible whether oral or in writing. The disjunctive statement of the contingencies, followed by the statement that no other evidence shall be received, clearly limits the evidence in each contingency to the appropriate proof of that contingency. The first contingency is a *provision* made for her by marriage settlement. The tolling of the revocation on that ground can only be proved by that means. Proof of a settlement such as that here advanced denying her any provision from his own property even as his heir, would not be sufficient since such a settlement would make no provision for her, but quite the contrary. It would take away that provision which, but for the agreement, the law would give her. Nor can it be said that decedent's relinquishment of any prospective claim, to her property as her heir would be sufficient, since the testator's death prior to that of the other spouse offers the sole field for the operation of the statute of revocation or any part of it. Clearly permission to retain her own property after his death, which she would retain on his death in any event would be no provision for her. It seems plain that if, as we have held, the statute means what it says, the settlement here claimed, even if established by competent evidence, made no provision for the surviving wife, hence did not toll the revocation. Had the settlement been mentioned in the will itself, a different question would be presented.

Clark v. Baker, 76 Wash. 110, 135 Pac. 1025. In that case, the will itself would have furnished the requisite statutory evidence to invoke the third contingency tolling the revocation. It will not do to say that the view here expressed rests in a technical construction of the statute, in that any provision however small would meet it. It is not technical. It is not even construction. It is the statute. The argument suggested should be addressed to the legislature. *In re Adler's Estate*, *supra*.

II. In any event the agreement here in question rested in parol and was subject to the ban of the statute of frauds, Rem. & Bal. Code, § 5289 (P. C. 203 § 3), which so far as material reads:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; . . ."

The sum of the appellants' argument to the contrary is this: that the agreement was made in contemplation of marriage, but was not made "upon consideration of marriage;" that while, of course, the agreement would not have been made had the parties not then intended to marry, and to that extent the prospective marriage entered into it and was considered by them, still the gist of the transaction was the mutual promise that each made to the other as to the future status of the property which each then owned. This argument is engaging, but is, as it seems to us, unsound. Where, as here, the antenuptial agreement is induced on both sides solely by the contemplated marriage and by its terms shows the single purpose on each side to preserve, after the marriage, the status which each would occupy toward the property of the other had there been no marriage, it is obvious

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that the marriage is the sole inducement to and the moving consideration for every promise made by each of the contracting parties. It is idle to say that the promise of each is made in consideration of the promise of the other. But for the marriage, neither had any right or interest present or prospective, in the property of the other to relinquish when the promise was made, and neither relinquished or agreed to relinquish to the other any right in his or her own property in any event. The mutual promises related to a property status to be created by the marriage and which would have no existence but for the marriage. But for the marriage there would be neither subject-matter, actual or potential, nor consideration, present or future, for either promise. This clearly distinguishes the case here from that instanced in *Browne on the Statute of Frauds* (5th ed.), § 215b (cited by appellants) as an example of a promise made in *expectation or contemplation* of marriage as distinguished from a promise made *upon consideration* of marriage. The text cited reads as follows :

“The distinction should be carefully noted between agreements in *consideration* of marriage, and agreements, which are merely in *expectation or contemplation* of marriage. In order that the contract shall be within the statute, marriage or the promise of marriage must have been its consideration or inducement. In a case where an intestate, about seven years before his marriage, borrowed money from the person who afterward became his wife, and in an interview with her shortly before their marriage, promised her that if she would not enforce payment of the notes, they should remain good and collectible against his estate, and she retained the notes during the coverture and after his death, it was held that, although the promise of the husband was made in contemplation of marriage, it was made in consideration of forbearance to collect the notes, and that after his death a claim for their amount by his wife was properly allowed against his estate, and that his agreement was not within the Statute of Frauds, and could be proved without writing.”

The case referred to is *Riley v. Riley*, 25 Conn. 153. Obviously in the case mentioned there was a present subject-matter, the debt evidenced by the note, and a present consideration for his promise, her forbearance to collect. Both existed independently of the promise of marriage. Such is not the case here.

The appellants cite one case which, so far as the oral antenuptial agreement related to personalty, sustains their view. But even in that case the agreement was held void since it also included prospective interests in real estate and impinged the law that such contracts can only be proved by written evidence. It was also held that the contract, being indivisible, was void *in toto*, which would also be true as applied to the facts here. *Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40. The Indiana court professedly based its decision as to the validity of the agreement touching personalty upon the Connecticut case of *Riley v. Riley*, *supra*. With deference, however, we suggest that the court overlooked the distinction between the two cases recognized in *Browne* on the Statute of Frauds and which we have attempted to point out.

The other cases cited by the appellants require scant notice. In *Sutherland v. Sutherland*, 68 Ky. 591, the statute of frauds is not discussed. The main question was that of a gift *causa mortis*.

In *Child v. Pearl*, 43 Vt. 224, the statute did not, like ours, avoid the contract, but merely required proof in writing. It was held not to apply to the agreement there in question because the wife's action was based not upon the oral antenuptial contract but upon her title to property that was always hers.

In *Edwards v. Martin*, 39 Ill. App. 145, the contract was in writing. The sole question related to the consideration.

In *Larson v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. 404, the agreement was one for support and the consideration and subject-matter both existed independently of the marriage so that the contract could operate regardless of any marriage.

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On the other hand, the respondent cites one case sustaining the view here expressed. In *Frazer v. Andrews*, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, a man and woman prior to their marriage made a parol agreement that the property of each should pass to their respective children on the death of either free from any claim by the other, the exact agreement claimed here. After marriage they entered into a written agreement of the same nature but in no manner referring to the oral antenuptial agreement. The written contract was held void under a statute declaring that, when property is owned by a husband or wife, the other has no interest therein which can be the subject of contract between them. The parol antenuptial agreement was held incapable of proof because made in consideration of marriage and such contracts under the Iowa statute are only susceptible of proof by written evidence.

We have found two other decisions clearly sustaining this view. In *Mallory's Adm'rs v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737, it was held that an antenuptial agreement that neither party shall have any interest in the property of the other by reason of the marriage, the exact agreement here, is a contract in consideration of marriage within the meaning of the statute of frauds and is not valid unless in writing. The court said:

"An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relation and make a law in that regard to suit themselves, and consideration for the contract is the agreement to marry each other, which must be consummated, else the consideration fails. So the contract clearly comes within the provision, *supra*, requiring contracts in consideration of marriage to be in writing."

See, also, *White v. Bigelow*, 154 Mass. 593, 28 N. E. 904.

The clear object of the statute touching revocation is to prevent a capricious or inadvertent disherison of the surviving consort. The clear purpose of the statute of frauds is

to remove the temptation to perjury. Neither object would be promoted by a construction of either statute which would sustain the agreement here asserted.

Affirmed.

Crow, C. J., MOUNT, MAIN, and FULLERTON, JJ., concur.

[No. 11693. Department One. January 6, 1915.]

THE STATE OF WASHINGTON, *Appellant*, v. NORTHERN
PACIFIC RAILWAY COMPANY, *Respondent*.¹

INTOXICATING LIQUORS — LOCAL OPTION — SHIPMENTS — WHOLESALE'S STOCKS AND DELIVERIES IN DRY UNITS. It is not a violation of the local option law, Rem. & Bal. Code, § 6309, for a common carrier to ship intoxicating liquors in original packages to a wholesaler within a dry unit, to replenish his stock or to make deliveries on orders taken in a wet unit; since the prohibition of shipments into a dry unit excepts shipments or deliveries of unbroken packages at residences by manufacturers or wholesalers or by any common carrier, and only requires "retailers" to dispose of their stocks, and provides that the act shall not be construed to prohibit the manufacture of intoxicating liquors in any no-license unit, "nor the delivery of the same;" thereby allowing wholesalers to make sales in wet units, and replenish their stocks and make deliveries in dry units.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered August 21, 1913, dismissing prosecutions for violation of the local option law, upon sustaining demurrers to the informations. Affirmed.

Frank W. Bixby and *Walter A. Martin*, for appellant.

George T. Reid, *J. W. Quick*, *L. B. da Ponte*, and *Isaac D. Hunt*, for respondent.

Crow, C. J.—Two informations were filed by the prosecuting attorney of Whatcom county against the Northern Pacific Railway Company, a corporation, charging it with a viola-

¹Reported in 145 Pac. 187.

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tion of ch. 81, Laws of 1909, p. 153 (Rem. & Bal. Code, § 6292, *et seq.*), commonly known as the local option law. By agreement of the parties, an amended information was filed in each case. One of these amended informations, omitting formal parts, reads as follows:

"Then and there being the said defendant, Northern Pacific Railway Company, a corporation, did then and there wilfully and unlawfully bring into Bellingham, Whatcom County, State of Washington, on or about the 26th day of April, 1913, a car load of intoxicating liquor, the said defendant Northern Pacific Railway Company being a public carrier, and the said liquor being consigned to the Puget Sound Bottling Works, a co-partnership, consisting of Raffael Geri and Benjamin Geri, engaged in part in the sale of intoxicating liquors at wholesale, and the said Bellingham being then and there a dry unit under Chap. 81 of the Session Laws of 1909.

"That on or about the 20th day of April, 1913, the said Puget Sound Bottling Works, a co-partnership, ordered from a manufacturing wholesale brewery in Portland, Oregon, the said car load of bottle beer, the same consisting of 405 cases; that the same was delivered in Portland, Oregon, to the Northern Pacific Railway Company, the above named defendant corporation, who agreed to transport the said beer to Bellingham, consigned to the said Puget Sound Bottling Works, a co-partnership, and issued its bill of lading therefor; that thereupon the said Northern Pacific Railway Company, a corporation, defendant herein, did transport said car load of beer to Bellingham, Washington, the freight having been prepaid by the shipper at Portland, Oregon; that the said Northern Pacific Railway Company, a corporation, defendant herein, did as a public carrier bring the said car load of beer into Bellingham, a dry unit under the Session Laws of 1909, State of Washington, the same being known as the 'Local Option Law,' and the same was transferred to the said consignee, Puget Sound Bottling Works, a co-partnership, at the side track of the said defendant corporation in Bellingham, Whatcom County, Washington, on or about the 28th day of April, 1913; that the said Puget Sound Bottling Works immediately transferred the said beer to its warehouse in Bellingham, Washington, the same not being a place of

public resort, but a place of storage only, and that subsequently, to wit, on or about May 1, 1913, and on subsequent consecutive days, the said Puget Sound Bottling Works, made deliveries therefrom in the original package at various residences in Bellingham, Washington, after the sale of the same by orders taken in wet units."

The other amended information was substantially the same, except that it charged that a car load of bottled beer was consigned to Benjamin Geri, a member of the partnership firm known as the Puget Sound Bottling Works; that the beer had been ordered by Benjamin Geri; that it was delivered to him by the Northern Pacific Railway Company on defendant's side track in the city of Bellingham; that Benjamin Geri immediately transferred the shipment to his private residence; that on the same day and on subsequent days he and the Puget Sound Bottling Works made deliveries in original packages at various residences in Bellingham after sales made by orders taken in wet units. It will thus be seen that the only material difference between the two amended informations is that in one instance a car load of beer was taken to the warehouse of the firm, while in the other it was taken to the private residence of a member of the firm.

It was stipulated that the two cases might be heard together, and they have been consolidated in this court. The defendant interposed a demurrer to each of the amended informations. Prior to the hearing of these demurrers, the parties filed a stipulation in each case setting forth certain facts which they agreed should be considered by the trial court in passing upon the demurrers. The facts in the first case thus stated in substance are: That on or about April 20, 1913, the Puget Sound Bottling Works ordered from a brewery in Portland, Oregon, one carload of bottled beer which was there delivered to the Northern Pacific Railway Company for transportation to Bellingham consigned to the Puget Sound Bottling Works; that having issued its bill of lading therefor, the railway company transported the beer

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to Bellingham, the freight thereon having been prepaid by the shipper at Portland, Oregon; that the sale to the Puget Sound Bottling Works by the brewery was made at Portland, Oregon; that the beer was packed by the shipper in original unbroken packages containing twenty-four quarts each, and was thus carried and delivered; that it arrived in Bellingham on April 26, 1913, and on April 28, 1913, was delivered by the railway company at its side track; that the Puget Sound Bottling Works, with its own conveyances transported the beer in the original and unbroken packages to its warehouse in Bellingham; that the warehouse is not a place of public resort, but is a place of storage only; that subsequently deliveries of the beer were made at residences in Bellingham; that the Puget Sound Bottling Works is not engaged in selling intoxicating liquors at retail; that the carload of beer was ordered for its convenience in the matter of making deliveries after it had taken orders for the sale and delivery at residences in Bellingham, Whatcom county, Washington, the sales and orders for such deliveries being made in wet units outside of the dry unit; that the Puget Sound Bottling Works has complied with all license laws with reference to its business; and that the Federal statute (Act of March 1, 1913, 37 Stat. 699), commonly known as the Kenyon-Webb act, was, at all times subsequent to April 1, 1913, in full force and effect. This stipulation is somewhat peculiar, as by its terms it seems to be agreed that the Puget Sound Bottling Works made sales and accepted orders in wet units for delivery in the identical dry unit where its stock of goods was held and located. However, we will consider the facts as they are stipulated. The trial court sustained a demurrer to each of the informations, and discharged the defendant. The state has appealed.

Appellant's contention is that the respondent violated § 18 of the local option act (Laws 1909, p. 165), which reads as follows:

"It shall be unlawful for any person, or public or private carrier to accept or receive for shipment, transportation or delivery to any person or place within any unit in which the sale of intoxicating liquor is forbidden under the provisions of this chapter, or to carry, bring into or transfer to any other person, carrier or agent, or handle, deliver or distribute in such unit any intoxicating liquor of any sort or character whatsoever; and whoever shall, either as principal, agent or servant, knowingly violate any of the provisions of this section shall, upon conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars, and upon a subsequent violation of this section, in addition to the fine hereinbefore prescribed, he shall, if a natural person, be imprisoned in the county jail for not less than thirty days nor more than six months. Provided, however, That nothing herein contained shall be construed to apply to any individual who may bring into such unit upon his person or as his personal baggage and for his private use intoxicating liquor in quantity not to exceed one gallon of spirituous liquor or one case of malt liquor, or to physicians or druggists to whom any public carrier may deliver such goods in unbroken packages, nor to deliveries to churches or the proper officers thereof of wine in unbroken packages for sacramental purposes, nor to shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, any unbroken packages of liquor, nor to shipments of liquor in continuous transit to a point outside of such unit, nor to shipments of commercially pure alcohol for mechanical or chemical purposes. This section shall apply to all packages of intoxicating liquor, whether broken or unbroken, and the carrying into or delivery of each such package of intoxicating liquor, regardless of the name by which it may be called, accepted, received, carried, transferred, handled, delivered, or distributed in violation of the provisions of this section, shall constitute a separate offense, and any liquor so carried or delivered shall be forfeited and shall be destroyed by the officer seizing the same: Provided, That nothing in this chapter shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same. . . ." Rem. & Bal. Code, § 6309.

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If § 18 were to be considered alone, and if we were to ignore its second proviso, there might be some force in the argument which appellant makes to the effect that shipments of intoxicating liquors in original packages cannot be lawfully made to a wholesaler in a dry unit for the purpose of replenishing his stock of goods, but the language, and the intent and purpose of the entire act must be considered. As stated by this court in *State v. Robinson*, 67 Wash. 425, 121 Pac. 848, the manifest purpose of the act is to prevent sales of intoxicating liquor in dry units, but the right of a wholesale dealer to continue his place of business in a dry unit, provided that he makes no sales therein, and confines his sales to wet units was recognized. We there said:

"Section 18 has reference to deliveries, and provides for the shipping and carrying of intoxicants into dry units in unbroken packages from some point without such unit, and seemingly permits the wholesaler, having his place of business within the dry unit, to deliver his goods therein. But this section does not, in the light of the other provisions of the act, permit him to sell his goods in a dry unit. . . . The act is pregnant with but one meaning, and that meaning is that intoxicating liquors shall not be sold in dry units except by druggists and pharmacists. Any other view would take the life blood out of the act. The wholesaler within a dry unit must, like his competitor without that unit, make his sales in wet territory."

Section 10 (Id., § 6301) of the act provides that, within ten days after the date when the result of any election under the act has become operative, every *retail* liquor dealer within the dry unit shall remove or cause to be removed, all intoxicating liquor from his place of business, and that failure so to do shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, given away, or otherwise disposed of in violation of the provisions of the act. There is no such provision as to wholesalers. Section 20 (Id., § 6311) provides that the issuance of an internal revenue special tax stamp or receipt by the United States to any person as a

retail liquor dealer at any place within a unit in which at the time of the issuance thereof the sale of intoxicating liquor was forbidden, shall be *prima facie* evidence of the sale of intoxicating liquor by such person, but provides that the section shall not apply to wholesalers. There is no provision in the act making it unlawful for a wholesaler to have his place of business in a dry unit, and store his stock of goods therein, although his sales, if any, must be made in wet units exclusively. Neither is there any provision in the act requiring the wholesaler to dispose of his stock of goods at any time after the local option statute takes effect in the dry unit where his place of business is located.

Appellant contends that the only purpose of the provision of the act requiring a retailer to dispose of his stock of goods, while permitting a wholesaler to retain his, was to afford the wholesaler a reasonable time within which he might gradually dispose of his stock by sales made in wet units in the due course of trade, but that section 18 (*Id.*, § 6309), which prohibits the shipment of intoxicating liquors into a dry unit discloses an evident intention that the wholesaler shall not be permitted to replenish his stock within such dry unit. If the legislature had so intended, it certainly would have so stated in an act of the length of the one now before us. Our construction is that the wholesaler is permitted to retain his place of business and store his stock of liquors in the dry unit, but that he cannot make any sales in such dry unit. If the act so contemplated, and it certainly does, the wholesaler could not continue his business of making sales in wet units without the right of replenishing his stock and receiving shipments for that purpose. The question naturally arises, How could he maintain his stock unless it may be shipped to him from outside the dry unit, and be delivered to him in original packages by a common carrier? The second proviso of section 18 (*Id.*, § 6309) is "That nothing in this chapter shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license

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unit, nor the delivery of the same." The history of the adoption of this proviso by the legislature is set forth by Judge Chadwick in his dissenting opinion in *State v. Bellingham Bay Brewing Co.*, 70 Wash. 654, 658, 127 Pac. 298. Construing this proviso, and especially the last clause "nor the delivery of the same" in the light of the entire act, and in connection with the fact that the wholesaler may maintain a place of business and have a stock of intoxicating liquors in a dry unit for the lawful purpose of making sales in wet units, it would seem that the respondent committed no offense, when it delivered liquors in unbroken packages to the wholesaler in the dry unit. It may be that this construction of the statute will afford the wholesaler a better opportunity for evading and violating the law by making illegal sales in a dry unit after he thus obtains his stock of goods; but, if so, the responsibility lies with the legislature and not with the courts, and the remedy, if any, must be obtained by legislation and not by judicial interpretation. If a wholesaler should violate the law by making illegal sales within a dry unit after he has lawfully obtained his stock of intoxicating liquor within such dry unit, criminal prosecutions should be instituted against him and not against the common carrier which lawfully delivered his stock of liquors. Our conclusion is that the trial court committed no error in sustaining the demurrers. The conclusion we have reached makes it manifest that the Kenyon-Webb act has no application to the facts of this case.

The judgment is affirmed.

MAIN, MORRIS, ELLIS, and GOSE, JJ., concur.

[No. 11785. Department One. January 6, 1915.]

LUCY NICHOLSON, *Appellant*, v. T. T. KILBURY, as
Administrator, etc., Respondent.¹

PARTNERSHIP—EXISTENCE—PROOF—EVIDENCE—SUFFICIENCY. AS the existence of a partnership depends upon the intent of the parties, and may be established by circumstantial evidence, tending to show a joint or common venture combining property, labor or skill, or some of these elements for the purpose of joint profit, the evidence is sufficient to establish, between an aunt and niece, a partnership relation in the lodging house business, where it appears that the business was started entirely with the money of the niece, then a young girl, who devoted her whole time to the business for fifteen years, and through whose efforts the business gained large profits, and assumed large proportions including several establishments, and the aunt had declared many times in the presence of numerous witnesses that she and her niece were equal partners in all the business conducted; and when, in view of all the circumstances, little weight should be given to the fact that the business was conducted and titles taken in the name of the aunt.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 7, 1913, dismissing an action for an accounting, after a trial on the merits to the court. Reversed.

Voorhees & Canfield and *C. E. H. Maloy*, for appellant.

Peacock & Ludden and *H. G. Kinzel*, for respondent.

ELLIS, J.—This is an action against an administrator for an accounting and settlement of the affairs of a partnership which it is claimed existed and continued between the plaintiff and the decedent from the fall of 1892 to the time of the decedent's death in October, 1911.

The evidence is very voluminous and much of it of little materiality. We cannot, within the reasonable limits of an opinion, set out more than the salient facts developed. It is not claimed that the contract of partnership was in writing,

¹Reported in 145 Pac. 189.

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and since one of the alleged partners is dead, the plaintiff could not testify to any express contract between her and the decedent. The evidence was therefore directed to an effort to establish the partnership by circumstantial evidence and the admissions of the decedent to various persons at different times throughout the existence of the alleged partnership. The following facts are either admitted or so thoroughly established by the evidence as to be beyond controversy.

The plaintiff was a niece of, and lived with, the decedent as a member of her family from the time she was a girl of fourteen. In the fall of 1892, when the plaintiff was about 17 years of age, she, with the decedent's family, moved from Sprague, Washington, to Spokane. She then possessed by inheritance from her mother furniture worth somewhere in the neighborhood of \$1,000 and sufficient to furnish eight or ten rooms in a lodging house. This furniture was used in furnishing a lodging house on Sprague avenue, in the city of Spokane. The plaintiff was a girl of unusual energy and executive ability and gave her whole time and attention to the development of the rooming house business conducted in the name of her aunt. The Sprague avenue house was conducted until March, 1893, when the plaintiff's furniture was moved to another house, No. 225 Howard street, known as the Little Metropolitan Hotel, which was conducted from March, 1893, until some time in 1898. In the spring of 1893, the plaintiff, through final settlement with her guardian, received \$570 in money which was also used in equipping the Little Metropolitan Hotel. The business prospered, and in 1895 or 1896, another lodging house on Howard street, known as the Star, was purchased. In 1897, another lodging house known as the Lauman House, on Riverside avenue, was purchased, furnished, and conducted as the other houses. It appears that, from March, 1893, until sometime in 1898, from one to three hotels were being successfully operated with considerable profit. In 1898, the three houses above mentioned were disposed of, and a house procured at 220 Howard

street, known as the Big Metropolitan Hotel. This was conducted until 1904, when it was sold and a larger establishment, known as the Riverside Hotel, was opened. This house was operated until 1909, when it was traded for two pieces of property in Whitman county, a farm, and seven lots in the town of Rosalia.

During nearly all of the time that the various lodging houses and hotels were operated, the plaintiff gave to them her constant attention, and for a part of the time conducted one or more of the houses with very little assistance from her aunt. It appears that, for about 14 or 15 years of this period, the plaintiff devoted all of her time and energy to the business, receiving no pay save her living. During the progress of the hotel business, a farm in the Big Bend country near Edwall was purchased, also two lots in Cook & King's addition to Spokane. The Edwall property was sold in 1902, and two lots in Moore's addition to Spokane purchased. This property is known in the record as the Mansfield property.

During this period, also, the decedent purchased an interest of certain of the other heirs in the estate of Amanda J. Fry, known as the Joseph Fry estate. The evidence as to this estate is not clear, but the plaintiff admitted that two notes aggregating \$3,400 in amount given for a sale of a part of the Fry land, known as the Markel notes, were the personal property of the decedent and not partnership property, the land which they represented having come to decedent as one of the Fry heirs. In 1907, three lots in Peter Sapro's addition to Spokane were purchased. This property is spoken of in the record as the Fairview or home property. In 1899, the decedent married the defendant T. T. Kilbury, who is now the administrator of her estate. In 1906, the plaintiff also married. For a short time after her marriage, plaintiff lived in the Fairview or home property, but afterwards returned to the hotel and devoted her time to its operation for

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a while, but it appears that, during the last year and a half of its operation, it was mainly conducted by the decedent.

The decedent had no property whatever at the time of embarking in the lodging house business. All of the furniture and money for starting the business were furnished by the plaintiff. All of the money for the purchase of furniture of the various hotels and for the purchase of the several properties, save such sums as the defendant claims that he himself furnished, was produced from the profits of operation and the proceeds of the sale of the various hotels. It clearly appears from the evidence that, during the progress of the business, the plaintiff and the decedent, from time to time, drew from the profits of the business such monies as were necessary for their living expenses, but had no accounting of any kind touching the partnership business. The uncontradicted evidence shows that the decedent many times, from 1893 up to her last illness in 1911, stated to several witnesses that the plaintiff was a partner in the business and was entitled to half of everything that the decedent held in her name. These statements were made to one A. L. Ritz, a brother-in-law of the decedent, many times during the years 1908 and 1909 and shortly before her death in 1911. He testified that the decedent at these times told him that all the money and property they owned when they opened the Little Metropolitan Hotel was Lucy's; that the decedent then had no money; that she, the decedent, had made whatever she had from that hotel as the start and that Lucy had a half interest in the business. One Margaret Frary also testified that, about the year 1898, she was living and boarding at one of the hotels in question, was well acquainted with the decedent, and that the decedent several times said to her that the plaintiff was a partner in the business and just as much entitled to her share of the profits as she, the decedent, was. Two other disinterested witnesses, one Miller and his wife, testified that they had lived and boarded at the Little Metropolitan Hotel in the year 1896 for a short time, and again in the year 1897, and at

times during the years 1898, 1899, and 1900 at other hotels conducted by the plaintiff and the deceased. Both testified that many times during those years the decedent had said to them that the plaintiff was a partner in the business and entitled to one-half of all that she, the decedent, had at any time. These witnesses also testified that, when the decedent in 1899 married the defendant, or shortly after the marriage, the decedent said to Mr. Miller that the plaintiff was threatening to withdraw from the business and demanding a settlement, that if she persisted in that course it would ruin her, the decedent, and asked Miller to intercede with the plaintiff and persuade her to let the business continue as before; that he did this with the result that the matter was not pressed and the decedent afterwards thanked him for his good offices in the matter. The decedent's two sons both testified that, at the time of the opening of the rooming house on Sprague avenue in 1892, the plaintiff's furniture was practically all of the furniture used in furnishing the house; that, on the opening of the Little Metropolitan Hotel in the spring of 1893, the plaintiff's furniture, and something over \$500 of the plaintiff's money, was used in furnishing that hotel, that the decedent had no property of any kind at that time, and that the decedent, throughout all of the period when the hotels were being conducted, recognized the plaintiff as a full partner in the business and often said to them and in their presence that the plaintiff was her partner and entitled to half of everything she, the decedent, had.

As opposed to all of this evidence tending to show a partnership, there is but one circumstance worthy of serious consideration not in harmony with the partnership theory. That is, the fact, which is undisputed, that, throughout all of the period covered by the alleged partnership operations, all of the business was conducted in the name of the decedent either as E. J. Smith or E. J. S. Kilbury; that the bank account was kept in her name and that the title to all property purchased was taken in her name.

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There were other circumstances testified to by defendant which it is asserted refute the claim of a partnership. To conserve space, we shall notice these but briefly. The defendant lived at intervals at the Sprague rooming house, at the Little Metropolitan Hotel, and other hotels conducted in the decedent's name prior to his marriage to the decedent in 1899. He claims that, during these times, he devoted his own time and labor to the promotion of the business, and, when he was otherwise employed, turned over to the decedent whatever monies he received above his own living expenses; that after the marriage he assisted the decedent in conducting the hotels and operating the farms and spent some of his own money in improving the farms and the other properties. He also joined with her in the execution of certain notes and mortgages for monies borrowed and secured on some of these properties, and the proceeds of such loans were used in the purchase and improvement of the properties. There were also introduced in evidence various bills and receipts rendered and given in connection with the hotel business running to the decedent or to the decedent and her husband, the defendant.

The trial court made no findings of fact or conclusions of law, but, after all of the evidence was in, entered a decree that the plaintiff take nothing by her action, but go hence, without day and that the defendant, as administrator of the estate of Emma J. Kilbury, deceased, receive his costs. The plaintiff has appealed.

The sole question presented by this appeal is whether the evidence was sufficient to establish the alleged partnership. Chancellor Kent defines a partnership as,

"A contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions." 3 Kent, Commentaries (14th ed.), p. *24.

See, also, *Ward v. Thompson*, 22 How. 330. There is no arbitrary rule by which it may be determined whether a part-

nership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture but is in the main inconsistent with any other theory. *Bridgman v. Winsness*, 34 Utah 383, 98 Pac. 186. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established. *McDonald v. Campbell*, 96 Minn. 87, 104 N. W. 760; *Torbert v. Jeffre*, 161 Mo. 645, 61 S. W. 823; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611; *Price v. Middleton & Ravenel*, 75 S. C. 105, 55 S. E. 156.

In *Haug v. Haug*, 193 Ill. 645, 61 N. E. 1053, a case closely analogous to that in hand in all points save that there the business was conducted under a partnership name, the court holding that the partnership was established by circumstantial evidence, said:

"There is no evidence in the record of any express contract of partnership, or written agreement of partnership, between the parties. It is well settled, however, that written articles of agreement are not necessary to constitute a partnership, but that a partnership may exist under a verbal agreement. (*Bopp v. Fox*, 63 Ill. 540). The existence of a partnership may be implied from circumstances. (*Kelleher v. Tisdale*, 23

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Ill. 405). A partnership may arise out of an arrangement for a joint business, wherein the word 'partnership' may not have been used. 'If there is such a joinder of interests and action as the law will consider as equivalent, and regards as in effect, constituting a partnership, it will give to the persons so engaged all the rights, and lay upon them all the responsibilities, and to third persons all the remedies which belong to a partnership.' (*Morse v. Richmond*, 6 Ill. App. 166).

"It is also well settled that when, by agreement, persons have a joint interest of the same nature in a particular adventure, they are partners *inter se*, although some contribute money and others labor. Such a partnership may well exist, although the whole capital is in the first instance advanced by one party, and the other contributes only his time and skill and ability in the selection and purchase of the commodities. (*Robbins v. Laswell*, 27 Ill. 365)."

It is true that in that case the use of the partnership name was regarded as the most potent fact in evidence, still the other circumstances tending to establish the partnership were neither undisputed as here, nor by any means so convincing as those found here.

In *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782, the alleged partnership involved the operation of a rural telephone business. No formal agreement was ever made. The title of the original stem from which the system was developed was taken in the name of one of the alleged partners. The other party, however, advanced the money for the purchase of this nucleus, to buy new material, and to operate the business. The parties operated the business together. The court held that these circumstances were sufficient to establish the partnership notwithstanding the lack of any express contract, either written or oral. The opinion implies that no partnership name was used in any part of the operation of the business. The court, speaking through Winslow, C. J., said:

"But it is not necessary that the partners should call themselves such. If they engage in a joint business enterprise,

each putting in capital or labor or both, with an agreement to share profits *as such*, there will be a partnership whatever they may call themselves. Nor need an express contract, either written or oral, be shown. Like other contracts which the law does not require to be in writing, a contract of partnership may be proven by circumstantial evidence, that is, by showing acts and conduct of the parties from which the fact may be inferred that the parties have agreed to become partners and share profits as such."

In view of all the evidence in this case, we give little weight to the fact that the business was conducted and titles taken in the decedent's name. When the business was started, the appellant was a mere girl. The other party to the venture was her aunt. Whatever their relative interest in the business, it seems only natural that it should be conducted in the name of the aunt. Since the aunt at all times admitted the partnership relation, it is not strange that the business was continued in her name. Nor do we see much probative force in the respondent's claim that he contributed of his own time and funds to the business. That contributed before the marriage was clearly a gift to the deceased, whom he then intended to marry. That contributed after the marriage would tend only to establish a community interest in his wife's half of the partnership property. Whether it would be sufficient, even for that purpose, we do not decide. It is true that, in the summer of 1907, a set of books was opened in the name of the respondent and the deceased, but that was near the end of the hotel business and after the appellant had already contributed some fourteen or fifteen years of her life and energy to its development. The circumstance is worthy of little consideration. The fact that the respondent joined in the execution of certain notes and mortgages is readily explained by the well known fact that the paper of a married woman is seldom taken without requiring that her husband join therein. Upon the whole record, we are clear that the partnership was fairly established. We fail, however, to find any evidence of an understanding that the appellant should receive a return

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of the money and the value of the furniture which she originally contributed to the enterprise.

The judgment is reversed, and the cause is remanded with direction to enter a decree in favor of the appellant establishing her undivided one-half interest in the entire estate save the proceeds of the Markel notes which it was admitted represented property which came to the deceased by inheritance.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

[No. 11808. Department One. January 6, 1915.]

GEORGE LUDWIGS *et al.*, Respondents, v. THE CITY OF
WALLA WALLA *et al.*, Appellants.¹

LIMITATION OF ACTIONS—ACCRUAL—CHANGE OF STREET GRADES—VIOLATION OF ORDINANCE. Limitations against an action to restrain a city from the violation of an unrepealed ordinance officially establishing curb grades, by the threatened lowering of the grade without first paying compensation, begin to run with each actual physical change, and not from the date of an ordinance authorizing an improvement under which certain previous physical changes had been made contrary to the originally established grades.

MUNICIPAL CORPORATIONS—STREET GRADES—CHANGE—DAMAGES. Both the city and property owners are bound to observe and conform to a definite street and curb grade, once established, and the city may not change it by order or motion without payment of any damages resulting to abutting owners; and such owners cannot recover damages for the destruction of sidewalks which did not conform to the official grade.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered June 6, 1913, upon findings in favor of the plaintiffs, in consolidated actions for injunctive relief, tried to the court. Affirmed.

Thomas H. Brents and *John F. Watson*, for appellants.

H. S. Blandford, *Sharpstein & Sharpstein*, and *T. P. & C. C. Gose*, for respondents.

¹Reported in 145 Pac. 193.

ELLIS, J.—Four separate actions were brought to enjoin the city of Walla Walla from enforcing an order that sidewalks, adjacent to the properties of the respective plaintiffs, be removed and new sidewalks laid at their expense. The issues being practically the same, the four cases were, by stipulation, consolidated.

The plaintiffs are the owners of certain business properties, some of which abut on the south line of West Main street, some on the west line of South Third street, and some on both of these streets. All of these properties are in the plat of the original town, now city, of Walla Walla.

Between the years 1875 and 1878, the city council caused the streets in question to be surveyed, grades established and profiles prepared by the city surveyor, and adopted and caused to be filed in the office of the city clerk the profiles of the grades as established.

On September 6, 1878, ordinance No. 17 was passed, making it unlawful for any person to construct any sidewalk or gutter except in accordance with the ordinance; requiring a permit from the committee on streets for such work; requiring the city surveyor, upon application, to make the necessary surveys for such work; requiring a certificate of the surveyor as to the accuracy of any such work before acceptance by the council; and providing for sidewalk locations and curb grades as follows:

“Sec. 9. The grade of Main and parallel streets hereafter established shall run from center to center, and the curbs of those streets shall correspond to the official grade of the center of the street opposite. The grades of streets running from north to south, on the intersection of Main and parallel streets shall be level and shall run from line of block to line of block, the grade of the curb-lines conforming to the official grade of cross-street, and running with grade parallel to the center of the street.

“Sec. 10. In all cases not otherwise provided for the curbs shall correspond to the official grade of the street of which said sidewalk shall form a part. Sidewalks shall rise

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from the curbs to the line of the block at the rate of one-fourth of an inch to every foot of width, and where the covering planks do not cover the whole width of the sidewalks the space not covered shall be filled to the top of the curb; the width of all sidewalks hereafter laid on streets eighty (80) feet wide shall be twelve (12) feet and upon streets one hundred (100) feet wide shall be sixteen (16) feet measuring from the line of the block to the outside of the curb."

On November 26, 1880, the council, by Ordinance No. 81, established a certain benchmark 100 feet above the base grades of the city as the initial benchmark of all levels thereafter to be run in the city. On January 4, 1881, Ordinance No. 88 was adopted, establishing the grades of Main street at the intersections of the center line with the cross streets, at specified heights above the base grades of the city. In 1881, the city, by special assessment against the abutting properties, graded and improved the roadways of Main and Third streets substantially to the grades so established.

The buildings on the Ludwigs property, or some of them, were first erected in 1881. All of the other buildings on all of the properties involved were built about the year 1887. So far as the record shows, none of the then owners of any of the properties secured any grades or surveys for the construction of these buildings. All that appears is that in the construction of the Ludwigs buildings the levels were taken from the physical surface of the crown of Main street. Wooden sidewalks were first constructed. In 1899 an ordinance was passed prohibiting wooden walks within certain limits, including the properties here in question. During the years 1900 and 1901 the several plaintiffs constructed cement concrete sidewalks along the adjacent streets here involved, replacing the old wooden sidewalks. None of these parties secured grades from the surveyor as required by the ordinance. Ludwigs claims that he was told by the chairman of the street committee to put his sidewalk on the same grade as the old wooden one, but the then city surveyor testified that he warned Ludwigs that he was building his walk off

grade and urged him to use the official grade. At any rate, the trial court found that all of these concrete sidewalks were above the official grade and none of the plaintiffs excepted to the finding. We therefore accept it as a fact.

In 1904 the city by ordinance created local improvement district No. 2, for the pavement of the streets here involved with asphalt on a concrete base. The district included all of the above mentioned properties. Main street is one hundred feet, Third street eighty feet wide. As formerly improved, the roadway on Main was sixty-eight feet, and on Third forty-eight feet wide. The width of sidewalks was, on Main, sixteen feet, on Third, twelve feet. The plan of the new improvement narrowed the roadway on Main to sixty feet, on Third to forty feet, thus extending the curbs four feet further into the streets on each side. The improvement consists of the pavement of the roadway from curb to curb, the construction of concrete curbs on each side of the narrowed roadway, and the laying of a four-foot strip of concrete sidewalk from the new curb to the old sidewalk. The two sidewalks failed to meet, the old being several inches higher than the new. The crown of the asphalt pavement conforms substantially to the elevation of the center grade line of Main street, as established in 1881 by Ordinance No. 88. The curbs, however, do not conform to Ordinance No. 17, as applied to that grade. All the curbs on Main street are five inches lower than the established center grade line of Main street, and on Third street four inches lower than the opposite center line of Third street. The same lowering of the curbs prevails throughout the whole district. This happened in this way. The city engineer adopted the property line instead of the curb line, as the base of the sidewalk grades, thus reversing the rule plainly prescribed in Ordinance 17, above quoted. Obviously, taking the property line as the base on a level with the center line of the street and sloping thence down to the curb, sixteen feet distant on Main street and twelve feet distant on Third street, at the rate of

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one-fourth of an inch to the foot, would make the curb just four inches lower with a sixteen-foot walk and three inches lower with a twelve-foot walk, and five inches lower with a twenty-foot walk than would have been the case had the ordinance been followed by taking the sixteen-foot curb line on Main street and the twelve-foot curb line on Third street as the base on a level with the center line of the street, and sloping the sidewalk grade thence up one-fourth inch to the foot to the property line and down one-fourth inch to the foot to the new curb. An attempt was made to justify this departure from the ordinance on the ground that for years that plan had been followed because of the varying heights of the crown of the streets before there were any permanent pavements. The actual physical crown of a street is, however, a very different thing from the officially fixed grade of the center line of the street. The *crown* would of course vary with the state of repair of the street. The *grade* being a fixed line with reference to the city datum, would be invariable. It is clear from the evidence that this confusion of crown with official grade has led to the blunder of placing the curbs in this district from four to five inches below the official curb grade.

The court found, in substance, all of the facts as above outlined, and further found that the plaintiffs' sidewalks are all above the official grade, while the strip of new sidewalk laid by the city is, on Main street, four inches, and on Third street, three inches, below the official sidewalk grade of the respective streets, and that the lowering of the sidewalks adjacent to the plaintiffs' properties will damage the plaintiffs' properties in addition to what they were damaged upon the making of the permanent improvement by the city in 1904. The defendants were accordingly enjoined from compelling the lowering of the plaintiffs' sidewalks to conform to the new strip of sidewalk until these damages have been assessed and paid. The defendants appealed.

The appellants contend that the actions are barred by the statute of limitations, because the curb grade was lowered in 1904 and these actions were not commenced till 1912. It must be remembered, however, that neither ordinance No. 17 nor ordinance No. 88, which fixed the established street and curb grades, has ever been repealed. They have merely been violated. The official grade has never been changed. The wrong, therefore, dates from each actual physical change. The respondents may be barred of any remedy for the construction of the four-foot strip of new sidewalk which was laid in 1904. They are not barred as to the threatened enforced lowering of the old sidewalks adjacent to their properties to a level below the established grades.

The appellants also contend that, under the decision in *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 199, to the effect that all that is required of a city is to construct the sidewalk with reasonable reference to the established grade of the roadway, no damages can be recovered in this case in any event. On the other hand, the respondents argue from the same case that their own old sidewalks, though higher, reasonably conform to the official grade of the roadway. That case, however, was decided upon its own facts. No grade had ever been established for the sidewalk area, either with reference to the center line of the roadway or otherwise. The sidewalk there involved was the initial improvement of the sidewalk area. So far as appeared, its level was the only official grade ever established. The sum of that decision is that, in an initial improvement, the laying of a sidewalk ten inches higher than the center of the roadway in a residence district, is not, *per se*, an abuse of the city's acknowledged power to establish original grades for its sidewalks. Here the city had actually established a grade for both roadway and sidewalk by formal ordinances. Both parties were bound to observe that grade and conform to it. A definite grade once established or long recognized by the city in improving the street cannot be changed without pay-

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ment of any damages which may result to the owner of abutting property. *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304.

The respondents urge that the city, by an order in 1891, raised the grade of Main street from Fourth to Second streets six inches. As pointed out in *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, there is no evidence that this order had any reference to the sidewalk area or curb grades, but there is another reason why it could have no such effect. The grades had already been established by formal ordinances. These ordinances could not be repealed or amended by a mere order on motion. McQuillin, Municipal Ordinances, § 210.

The clearly established fact that, in this case, the city, in violation of the provisions of Ordinance No. 17, adopted the property line as the base for the sidewalk grade instead of the curb line sixteen feet from the property line on Main street, and twelve feet from the property line on Third street, thus lowering the established curb line four and three inches respectively, distinguishes this case from that presented in *Jones v. Gillis*, *supra*. In that case, there was no evidence that the sidewalk grade did not conform to the center line of the street. In fact it is said in that case that the strip of new sidewalk was "about level with the crown of the street."

The respondents are not entitled to recover damages for the destruction of their old sidewalks so far as they do not conform to the official grade. They are, however, entitled to such damages as may result solely from lowering the sidewalks contiguous to their properties below the established grade.

The judgment is affirmed.

Crow, C. J., CHADWICK, MAIN, and PARKER, JJ., concur.

[No. 12028. Department One. January 6, 1915.]

NORTH IDAHO GRAIN COMPANY, LIMITED, *Respondent*, v.
I. P. CALLISON, *Appellant*.¹

SALES — EXECUTORY OR EXECUTED — INTENT — "SOLD." Whether a sale is executed or executory will depend on the intent of the parties, and the use of the word "sold" is not conclusive when other conditions in the contract indicate a different intention.

SAME — EXECUTED SALE — EXISTENCE OF PROPERTY — POSSESSION OF VENDOR — PRESUMPTIONS. There can be no valid executed sale unless the thing sold has an actual or potential existence at the time of the sale; and if the property is to be acquired by the vendor, it is *prima facie* an executory contract.

SAME — EXECUTED OR EXECUTORY CONTRACT — EVIDENCE — SUFFICIENCY. An accepted offer of two hundred tons of number one timothy hay is not an executed contract for the sale of the hay, on which an action for the contract price will lie, but only an executory contract for breach of which the vendee is liable only for damages for loss of profits, where the vendor did not have the hay at the time of the sale, and in buying hay to fill the order did not set aside and appropriate a specific lot of hay and hold it subject to the contract; but after getting together part of the hay, reappropriated and converted it to the vendor's own use, expecting to substitute hay from the next year's crop.

SAME — EFFECT OF INSURANCE — EVIDENCE — SUFFICIENCY. In such a case, the nature of the contract is not affected by the fact that the vendee directed insurance to be carried, where the direction was made at a time when the vendee believed the hay had been purchased and specifically assigned to its account, whereas it was part of a common mass, and the insurance was not in the vendee's name, but a blanket policy covered all of the vendor's hay.

ELECTION OF REMEDIES — INCONSISTENT REMEDIES — SALES CONTRACT. A vendor, having adopted the theory of an executed sale and sued for the price due, cannot recover for loss of profits on the theory of a breach by the vendee of an executory contract of sale.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 27, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

¹Reported in 145 Pac. 232.

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John C. Hogan and A. E. Graham, for appellant.

Bridges & Bruener and Glen Snider, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover the balance of the purchase price due under a contract for the sale of two hundred tons of No. 1 timothy hay. Plaintiff was a wholesale dealer in hay at various points in the state of Idaho and defendant is a dealer in the same commodity at Aberdeen, in this state.

The contract of the parties is evidenced by correspondence, the offer and acceptance being as follows:

“North Idaho Grain Co.,

Sept. 2nd, 1910.

“Deary, Idaho.

Gentlemen: Replying to your letter of the 27th, we will take 200 tons of number one timothy at \$20.75 f. o. b. points between Palouse and St. Maries on the W. I. & M. road. Please wire acceptance of this order. Yours very truly, (Signed) Chehalis Produce Co. by I. P. Callison.”

“Chehalis Produce Co.

Deary, Idaho, Sept. 5.

“Aberdeen. Accept offer two hundred tons timothy, yours second. (Signed) North Idaho Grain Co.”

The telegram accepting defendant's offer was followed by a letter of even date as follows:

“Messrs: We wired you as follows: ‘Accept offer two hundred tons timothy. Yours second.’ This telegram was in reply to your letter of the 2nd inst., and covers 200 tons of No. 1 timothy at a uniform price of \$20.75 f. o. b. points on the Washington, Idaho & Montana Ry. taking Palouse rate, viz. \$3.85 per ton to coast terminals. These shipments will come to you from Palouse, Wellesley, Potlatch, Harvard and Deary, possible Princeton.

“We were genuinely pleased to receive this order and as soon as you give us shipping instructions, we will begin loading. All of these shipments must come via the Washington, Idaho & Montana and the Chicago, Milwaukee & Puget Sound and will be so routed and loaded into Milwaukee cars.

“Awaiting your instructions and assuring you that we will give your orders prompt attention, we are, Yours very

truly, (Signed) North Idaho Grain Co., Ltd., By F. C. McGowan."

To which defendant made reply as follows:

"Gentlemen: We are in receipt of your letter of the 5th confirming sale to us of 200 tons of number one timothy at \$20.75 f. o. b. points on the W. I. & M. Road taking the same rate as Palouse. Just at the moment we are flooded with hay but will be able to hand you shipping instructions on a part of the order in a few days. Yours very truly, (Signed) Chehalis Produce Co. By I. P. Callison."

After the contract was entered into, defendant wrote to respondent that he had found that he could not ship the hay to Grays Harbor without transferring it at Tacoma from the Milwaukee railroad to the Northern Pacific railroad, which would involve a cost of 50c extra, and that there would be more delay in shipping the hay than he expected. Plaintiff responded:

"We will send you warehouse receipts attached to a draft for 90% of the f. o. b. value if this will be satisfactory to you and will ship out as per your instructions."

Pending an answer, plaintiff wrote to defendant, saying:

"We will be willing to keep the hay in our warehouse without storage charges until ninety days after the date of contract. If it cannot be moved at that time we will consider extending free storage until January 1st. The matter of interest, however, is a considerable item to small shippers like ourselves and inasmuch as you have not accepted our suggestion that we draw on you through your bankers for ninety per cent of the selling price we offer the following method of handling it, viz., we will charge you on ninety per cent of the total hay sold, interest at the rate of eight per cent and will include this interest in the invoice when hay is ordered out. This of course to be in addition to the insurance which we are continuing on the hay. Although you have not advised us to do this we have deemed that you would want this protection. We trust you will find these suggestions in order and remain, Yours very truly, North Idaho Grain Co., By F. C. McGowan, EL."

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On November 7, defendant wrote to plaintiff as follows:

"Referring again to your letter of the 14th, in regard to our contract with you, we beg to submit the following arrangements:

"We will pay you 8% interest on 90% of the amount of the purchase price of the hay, interest to be computed from the 1st day of November, up to the date of the date of the shipment of each car.

"Insurance up to \$3,500.00 is to be carried by you for us, at the rate of 80 cents per \$100.00, dating from November 1st and expiring as the hay is shipped, this insurance to be charged to us.

"We are to have free storage on the hay up to March 1st, and to pay storage at the rate of 10 cents per ton per month on all hay carried beyond that date.

"The interest, insurance and accrued storage on each car of hay is to be included in your invoice as the hay is shipped out.

"We are asking free storage on account of the fact that the hay was bought by us through a misunderstanding of the freight arrangements over the Milwaukee Road. Since this purchase we have withdrawn from your territory and have made no effort to purchase hay up that line. As a result you have no doubt been able to secure hay to fill the order at a very favorable figure. Yours truly, Chehalis Produce Co.,
By I. P. C."

On the 10th of November plaintiff replied:

"We have your letter of the 7th and note what you say about our having been able to purchase the hay at a very favorable figure. We wish that this might have been the case, but unfortunately we expected you to give shipping orders at once on this purchase, and we therefore proceeded at once to buy sufficient to cover our contract. This high priced hay, we still have, as it was necessary to pay a price above the market at that time in order to get it. And our interest on the money used to buy it is still being paid to the banks where our loans are obtained.

"The paragraph of your letter regarding insurance we will accept as an agreement. This means, however, that we carry it during the month of October for nothing.

"We will agree to grant free storage until Feb. 1st, as hay ought to be moving by that date if it is going to move at all.

"Although we began paying interest on the money put into this hay on September 10th, we will waive the 20 remaining days of that month, but we think we are entitled to 8% interest on 90 per cent on the entire purchase price from sixty days thereafter, or from Dec. 1st.

"We appreciate the hay conditions at the present time, and have tried to modify your offers as little as possible. The margin you would have left us would have been insufficient to let us out whole, and we trust our counter-proposition will be acceptable to you. We are, Yours very truly, North Idaho Grain Co., By F. C. McGowan."

There seems to have been no further correspondence until in January, 1911, when negotiations for a settlement were instituted. On March 24, plaintiff wrote:

"The writer has just returned from a trip to Wisconsin and Eastern points. Having been away about five weeks, we feel that we are a little out of touch with market conditions and consequently write you to know what the possibilities of shipping your hay to you are going to be within the next thirty days. We have been looking over your contract letter of Nov. 14th and note that the free storage period ceased on March 1st and as it may now be possible for you to receive this hay, putting it into your own warehouses, we deem it advisable to write you in order to call this matter to your attention. . . . Yours very truly, North Idaho Grain Co., by F. C. McGowan."

Receiving no reply to this letter, plaintiff wired defendant:

"Chehalis Produce Co., Deary, Idaho, May 17, 1911.

"Aberdeen, Wash. Have had no reply to our letter of the 13th. We desire to move this hay at once and are therefore anxious to hear from you. We await your reply. North Idaho Grain Co."

Defendant replied:

"Aberdeen, Wash., May 18, 1911.

"North Idaho Grain Co.

"Deary, Idaho. Gentlemen: We consider our hay contract cancelled. Our previous offer was withdrawn when you

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refused to accept and the contract time for delivery is now past. Yours truly, Chehalis Produce Company, By I. P. C."

No hay was ever shipped under the contract. In August, 1911, plaintiff began an action in the courts of Idaho and attached 150 tons of hay, more or less, in the Wellesley warehouse and either 73 or 71 tons in the Potlatch warehouse. This was sold and bought in by McGowan, the manager of the plaintiff, for the sum of \$1,000. After deducting costs, the balance remaining was applied on the purchase price.

This suit was begun in the superior court in and for Chehalis county to recover the balance alleged to be due.

The lower court found that there had been a present sale; that title had passed to the defendant, and that no part of the purchase price had been paid other than the credit realized from the net proceeds of the sale. Judgment was rendered for the balance due, with interest, costs, etc.

It is the contention of the defendant that the transaction was no more than an executory contract to purchase the hay, or an option revocable at any time before it was executed by delivery, which, under the custom of the trade, was at Aberdeen, Washington, and plaintiff's remedy, if any, was an action for damages for the loss of its bargain. Both parties accept the case of *Lauber v. Johnston*, 54 Wash. 59, 102 Pac. 893, as a correct statement of the law, that is:

"The question as to when the title to personal property passes to a vendee under and in pursuance of a contract of sale, depends upon the intention of the parties. Whether the contract is executed or executory must be determined by its terms and purposes, the nature, conditions and situation of the property sold and the circumstances surrounding the parties."

See, also, *Meeker v. Johnson*, 3 Wash. 247, 28 Pac. 542; *Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544. It will be necessary to make particular reference to the facts when discussing the law of the

case and we shall not therefore undertake a further or connected statement.

To sustain the judgment of the trial judge, plaintiff depends upon the following propositions: First: The contract by its terms is a present sale; second: The concomitant circumstances,—(a) the purchase of the hay by it to fill the contract; (b) the piling of the hay in separate piles to be shipped on order; (c) the insurance of the hay at defendant's request.

Whether a sale is executed or executory, will be resolved by reference to the real intent and purpose of the parties. Authorities might be multiplied, but it will be unnecessary to go beyond the decisions of this court. In *Meeker v. Johnson*, the contract was in writing, the words of transfer being, "Sell, transfer and set over." In commenting on the case of *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, Judge Dunbar, who wrote the opinion of the court, said:

"It is true that the formal word "sold" is used in this contract, as in that; but so it is in a great majority of contracts of this kind where it is not claimed by either party that they are anything more than executory contracts. This may be, and doubtless is, one expression among others, to indicate the intention of the parties; but it is only one, and is not conclusive when the other conditions in the contract indicate a different intention. It is a legal conclusion, rather than a statement of fact."

In the *Pacific Coast Elevator Co.* case, there was a written contract, the apt words being, "The Pacific Coast Elevator Company agrees and hereby sells to Bravinder & Keats, 1,500 bu. of wheat, etc." The court considered all the facts of the case and held,

"that the evident intention of the parties under this contract was not that it constituted a present sale, for the plaintiff was to segregate and weigh or measure the amount agreed to be sold, and was bound to deliver merchantable wheat."

In *North Pacific Lumber & Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595, the apt words were, "do by these presents,

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grant, bargain, sell and convey." It was held, in the light of all the facts, that these words were not conclusive.

The apt words in the cases cited are even more strict than the words employed by the parties in the case at bar. It will be remembered that when plaintiff offered hay at a certain price, defendant said: "We will take 200 tons of number one timothy &c," to which plaintiff replied, "Accept offer two hundred tons timothy." Both parties have filed exhaustive briefs and cited authority *ad libitum*, but it seems to us, that, being bound to consider the case in the light of its own facts, no real service would be performed by reviewing and commenting upon the authorities. The case may be resolved by reference to well settled and certain fundamental principles. For this reason, then, we will not undertake to follow counsel in their excursions into the vast realm of the law of sales.

It is a fundamental principle that, in every completed sale, the title to the thing sold passes to the purchaser. There is "a transmutation of property from one man to another in consideration of some price or recompense in value." 2 Blackstone's Com., 446. This being so, all authorities concur in laying down the rule that there can be no valid executed sale unless the thing sold has either an actual or potential existence at the time of the sale. That is to say, it must actually exist and be in the possession or under the control of the vendor, or it must come out of something that is in his possession or under his control, as for instance, growing crops, goods in the process of manufacture, the increase of cattle and the like. As said by Chancellor Kent, the property must be "specific, or defined and capable of delivery, otherwise it is not strictly a sale but a special or executory agreement." 2 Kent Commentaries (14th ed.), 468; 1 Chitty, Contracts (9th ed.), 517; Parsons, Contracts (9th ed.) page *521.

"Neither the rule itself, nor the reason on which it is founded, has any application to an executory agreement for future sales." *Whitehead v. Root*, 2 Met. (Ky.) 584.

The question then, notwithstanding the words of the contract is, What did the parties intend?

"This intention must be found evidenced in some way other than by the words used in the instrument or by the surroundings of the parties stated in the petition." *House v. Faulkner*, 61 Tex. 308.

The contract to be construed was for the sale of goods not then in the possession of, but to be acquired by, the plaintiff, and is *prima facie* an executory contract for the sale of personal property. The title in the hay would not pass to the vendee until the vendor, after it had acquired the hay, did some act appropriating it to the contract. As for instance, piling it away or setting it apart pending shipment, or by marking or branding it. 2 Kent's Commentaries, 496; 1 Chitty, Contracts (11th Am. ed.), 524; *Langton v. Higgins*, 4 H. & N. (Eng. Exch. Rep.), 402.

We have examined the record in this case with some care, and are convinced that, while there are some circumstances that might, if standing alone, be sufficient to sustain a judgment in favor of plaintiff, when considered in the light of all the evidence, they cannot be held to be controlling.

In the first place, we find, contrary to the holding of the trial judge, that plaintiff has not sustained its contention by a preponderance of the evidence that it did receive and pile separately a specific lot of hay and hold it subject to the contract; or that it had, at any time when it might be called upon to make delivery under the contract, No. 1 hay in sufficient quantity to fill its contract. The most that can be claimed for plaintiff is that it was engaged in the business of buying and selling hay; that it entered into a contract to deliver a specific quantity of a given quality and it believed itself to be prepared to deliver when called upon to do so. Plaintiff's manager says:

"Q. I presume when you purchased hay from a rancher at the time this hay was piled you would try to segregate the number one and two hay. A. If there was a bale or two

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we wouldn't but if it amounted to five or six bales we would because it would make a mixture. . . . Q. You say when that hay was taken in there was an endeavor made to separate the number one hay from the number two hay? A. We always do that. Q. You say if it is only a matter of two or three bales you didn't mind it? A. They might go into number one. Q. If it is a matter of seven or eight bales they would separate it? A. That is correct. Q. In doing that they were just aiming generally to put the number one in one place in the warehouse and the number two in another place? They wasn't grading it for shipping purposes? A. No, because you wouldn't get (all) that was put in, say you seen three sides of it and on the other side some stubble sticking out, you might see that when you would load it and spot it out. Q. When you come to grade for purpose of shipment? A. On a weak market you have to. On a strong market it isn't usually the custom. Q. You say at first you began to pile hay in the west end of the Wellesley warehouse? A. Yes, sir. Q. And later as the warehouse got more hay in it you piled it over the warehouse generally? A. Yes, sir. Q. And it was all one mass? A. It was together. Q. All together? A. Yes. . . . Q. You considered you had a right to give him hay out of any of these warehouses? A. I considered I had just as much right to give him two hundred tons of number one hay anywhere along that line. Q. In or out of any of these warehouses? A. Yes, sir, that is according to the contract."

On the other hand, it seems to us that the defendant has proved, by a preponderance of the evidence, that there was not 200 tons or 150 or even 129 tons (the amount finally weighed out) of number one hay in the Wellesley warehouse, where plaintiff undertook to attach the residue of its holding and estimated the lot at 150 tons more or less.

It is unnecessary to go into the testimony of the witnesses. It is enough to say that it preponderates in favor of the defendant.

It is shown, also, that some of the hay which plaintiff now claims to have passed under the contract to defendant at the time of the sale in virtue of the subsequent buying and

alleged segregation, was not purchased until the spring of 1911. This, coupled with plaintiff's letter of May 18th, written in response to the suggestion that it did not have hay in quantity and quality to fill its contract, that it could supply 150 tons of No. 1 hay and 50 tons that would not be docked more than \$1 per ton, is in itself enough to overcome plaintiff's theory of an executed sale of a specific lot of 200 tons of hay, purchased, set aside and held, for the defendant. Moreover, it appears that in July, 1911, one Miller, plaintiff's successor, wanted the hay then stored in the Potlatch warehouse, and which it is now insisted was held as the property of the defendant, to make up a shipment of his own. Plaintiff's manager allowed him to take it upon the promise of substitution. Miller replaced the hay out of the 1911 crop. It was the new hay or the Miller hay in the Potlatch warehouse that was attached and sold. By no stretch of the imagination can it be held that specific property sold, segregated and held for shipment to another can be otherwise disposed of and hay of another crop substituted therefor, except it be on the theory of an executory sale and the holding of the vendor in readiness to deliver hay of the kind and quality upon demand. Furthermore, hay that is alleged to have been sold was made the subject of a pledge by the plaintiff to its bank. It remained subject to plaintiff's debt from September 4, 1910, to April 4, 1911. Plaintiff bought and sold, pledged and loaned its stock of hay without reference to its contract with defendant, apparently assuming that it would have enough of the old crop, or, if that were gone, enough of the new crop, or the hay Miller was to return, to deliver 200 tons.

The conduct of the plaintiff is entirely inconsistent with its present theory. That the plaintiff regarded the contract as executory is more clearly indicated. When the sheriff went to attach the hay in the action instituted by plaintiff in the courts of Idaho, plaintiff had no particular hay in any particular warehouse in mind; but at the suggestion of

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the sheriff permitted him to attach the hay in the Wellesley and Potlatch houses, they being more convenient and closer to the sheriff's center of activity than the other houses.

It is elementary that a vendor cannot maintain an action for the purchase price of goods sold unless, at the time the contract calls for delivery, or at the time when he ought to make delivery, he has the goods and is ready and able to deliver them. 35 Cyc. 531.

"Under the contract of sale, the delivery of the iron and the payment of the money, were things to be done at one and the same time. The plaintiffs were not bound to deliver the iron, unless the defendants at the same time paid the money; and the defendants were not bound to pay the price unless the plaintiff at the same time delivered the thing sold, or was ready to deliver it. The obligations to deliver on the one part and to pay on the other, were mutual and dependent. If the buyer in a case of this sort fails to pay or offer to pay within the time specified for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold. But it does not follow that the seller, in such case, is entitled from the mere default of the buyer, to recover the purchase money. To entitle the seller to recover the price, he must show not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods." *Dunham v. Mann*, 4 Seld. (N. Y.) 508.

The record is entirely bare of sufficient facts to sustain plaintiff's theory to sustain the judgment upon this feature of the case. As we have shown, plaintiff, if it had ever set apart 71 or 73 tons of hay which it claims to have had in the Potlatch house, reappropriated and converted the hay to its own use when it allowed Miller to take it and ship it. We have, therefore, so far as this case is concerned, the hay remaining in the Wellesley warehouse and which was attached as 150 tons more or less, but which it is admitted weighed out only 129 tons, for the contract to operate upon. It follows that, plaintiff being in no position to make delivery at the time it assumed to make constructive delivery by

levying an attachment on the amount of hay it claims to have sold to the defendant, it cannot recover; for while defendant might on his side be willing to take less than the whole, plaintiff cannot, either actually or constructively, compel him to do so.

But it is said that the direction to insure the hay was an acceptance and an agreement that the contract was a present sale. This at best is but one circumstance, and as said by Judge Dunbar in the *Meeker* case, will not be considered to the exclusion of others. In arriving at the intent of the parties we must place ourselves in the position occupied by them. This direction was made at a time when defendant believed that the hay had been purchased and specifically assigned to its account, whereas in fact the hay had not been purchased and held for defendant's account but was a part of a common mass out of which plaintiff assumed to make delivery upon call. Neither was the hay insured for defendant or in defendant's name. It was at that very time insured under a blanket contract covering all of the warehouses. One thing is certain, defendant could not have collected on the contract of insurance if there had been a loss. The insurance had been taken out and was carried for plaintiff's benefit.

Warehouse cases holding that a vendor has a right to supply grain, hay, and like commodities out of a common mass are cited and relied on. Admitting, but not deciding, that the rule applies to baled hay bought under a specific contract, plaintiff itself adopted the theory of a purchase and holding of a specific lot. Plaintiff might have adopted the theory of an executory sale and brought an action for damages. Having adopted the one theory, it cannot now claim the benefit of the other or take from defendant the legal benefit flowing from its conduct.

Other questions are raised by counsel on both sides. Believing, however, that the sale was not an executed sale, or, if executed, that the plaintiff reappropriated and converted

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the property to the extent that it was not in position to deliver at the time it assumed to deliver, it will not be necessary to pass upon them.

Reversed and remanded with instructions to dismiss.

Crow, C. J., PARKER, MORRIS, and GOSE, JJ., concur.

[No. 12139. Department One. January 6, 1915.]

DOMINICK RASTELLI, *Respondent*, v. L. C. HENRY *et al.*,
Appellants.¹

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY. Whether the foreman of railroad construction work was guilty of negligence in not anticipating injury to an employee whom he ordered to ride on the front of the engine, is a question for the jury, where there was evidence that the foreman placed a heavy pinch bar on the foot board of the engine, which joggled off on account of the roughness of the roadbed, and struck dirt dumps which the foreman knew had not been leveled, and caused the employee to be thrown onto the tracks.

SAME—ASSUMED RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether an employee in railroad construction work assumed the risks or was guilty of contributory negligence in obeying an order to ride upon the front of the engine, whereby he was thrown onto the rails when a heavy pinch bar on the foot board joggled off and struck dirt dumps that had not been leveled, are questions for the jury, where, although the employee knew of the presence of the pinch bar and the roughness of the roadbed, he did not know of the presence of the dirt dumps, which were usually leveled off as soon as dumped, and he was ordered to hurry, so that he had no opportunity to select a safer place on the front of the engine than the one he occupied.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 26, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in railroad construction work. Affirmed.

¹Reported in 145 Pac. 195.

Peters & Powell and *G. E. de Steiguer*, for appellants.

Burton E. Bennett, for respondent.

GOSE, J.—The plaintiff was injured while engaged in the service of the defendants, and seeks compensation upon the theory that the defendants were negligent. The jury adopted the plaintiff's view of the case, and the verdict was made effective by a judgment. This appeal followed.

This is the second appeal. *Rastelli v. Henry*, 73 Wash. 227, 181 Pac. 643. The facts are fully stated in the opinion on the former appeal. In brief, they are as follows: The respondent is an Austrian by birth, was twenty-six years of age at the time he met his injury, and was experienced in railroad construction work. He had worked for the appellants about eight days. The appellants were making a fill for a side track. The respondent worked a part of a day along the fill. He was then put to work as a pitman, that is, working about a steam shovel. The dirt for the fill was loaded onto cars by means of a steam shovel. The cars were hauled on a temporary track to the fill, where they were dumped. It was customary for the men who dumped the cars to level the dirt immediately. The respondent testified that, on the morning of the accident, the appellants' foreman directed the steam shovel crew to get onto the pony engine and go down the track for the purpose of putting a steam or leveling plow onto the track; that the foreman directed him to take a frog weighing twenty-five or thirty pounds (others say eighty pounds) with him; that he did so; that he attempted to get on the back part of the engine, and found the space all taken; that the foreman then said to him to get on in front; that he got on in front with the frog, and noticed a pinch bar lying upon the running board; that he stepped upon the running board and had to hold to the frog; that the engine started at once; that after they had gone some distance, the pinch bar shifted so that it projected over the end of the running

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board, came in contact with an earth dump, and threw the plaintiff in front of the engine in such a way that his leg was cut off. The foreman testified that a few dumps had been left near the edge of the temporary track the day before to be leveled with the plow car as soon as it was placed on the track. A witness for the respondent testified that the foreman put the pinch bar on the running board of the engine. The pinch bar was four or five feet in length and weighed twelve to fifteen pounds. Respondent said that just as soon as he got onto the foot board the engine started, and that the whole crew including the engineer was under the direction of the foreman. The witness who testified that the foreman put the pinch bar on the foot board said that the foreman told the respondent to get on in front, and said, "Hurry up; jump on in front," and that the respondent obeyed the order. A witness testified that the dumps are usually leveled at once by the men who dump the cars. The testimony shows that the foreman knew that the dumps were there. There is no evidence that the respondent knew this fact. The inference is that he did not, because, as we have said, the testimony is that the custom was to level the dumps at once. The foreman testified that he did not put the pinch bar on the engine, and that he did not know the respondent was upon the front of the engine until after he had been injured.

The appellants contend, (1) that the injury could not have been reasonably foreseen or anticipated; (2) that the respondent assumed the risk and was guilty of contributory negligence.

In the light of the facts stated, we think it was for the jury to say whether an ordinarily prudent foreman ought reasonably to have anticipated the results that followed. The jury were warranted in believing that the foreman placed the pinch bar upon the running board, and the foreman testified that he knew of the presence of the dumps. The jury were also warranted in believing that a reasonably

prudent man would have anticipated that the motion of the engine might cause the pinch bar to project beyond the end of the foot board.

Questions of assumed risk and contributory negligence will be considered together. The respondent was a man experienced in railroad construction work. He knew that cars were being loaded with dirt and that dirt was being dumped into the fill; but there is no testimony that he knew that the dumps had not been leveled. He assumed the open and obvious dangers, but he did not assume those that were not open and obvious. He knew of the presence of the pinch bar. As a man experienced in such work he knew that the track was a temporary one and that the pinch bar might joggle over the end of the foot board. The proximate cause of the injury, however, was the presence of the pinch bar and the dump of earth. He knew of the presence of one of the elements, but not of the other. The burden of proving that the respondent assumed the risk or that he was guilty of contributory negligence was upon the appellants.

It is argued in this connection that the respondent voluntarily chose the running board which was a dangerous place, when he might have stood upon the deadwood which was a safe place. The answer to this is two-fold; first, he did not know of the presence of the dump; second, he was told to "Hurry up; jump on in front," and just as soon as he got onto the running board with the frog the engine started. The jury were warranted in believing this testimony and, if they did believe it, the respondent had little time or opportunity for selecting a safe place or for determining which was the safer place, the deadwood or the footboard.

It is said that respondent should have laid the frog upon the rods or hand rails which were attached to the engine, and that he should have taken hold of one of these rods. He testified that he could not so place the frog, and that he had to hold it. The photographic views of the engine do not

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conclude him upon the question, in view of the haste with which he was required to act.

The appellants have cited a line of authorities which would be in point if the respondent had been injured because of any defects in the temporary track. The respondent testified that he knew that the track was not good. He, of course, knew that it was a temporary track. He knew the character of the work. Indeed, he knew every condition and every element present save one, the dump of earth.

We think the case was one for the jury. The judgment is affirmed.

Crow, C. J., and PARKER, J., concur.

CHADWICK, J. (concurring)—It is my opinion that the former decision of this court, 73 Wash. 227, 131 Pac. 643, is wrong. The danger was obvious, and the risk was incident to the work then being done by the plaintiff and his associates; but this court held, inferentially at least, that if there had been testimony tending to show that the foreman himself had placed the pinch bar on the foot board, it would be for the jury to say whether it was an act of negligence and the proximate cause of the injury. That decision, it seems to me, compels the present holding, and for that reason I concur in the result.

[No. 12151. Department One. January 6, 1915.]

A. T. DISHMAN, *Respondent*, v. R. E. STROM, *Appellant*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting oral testimony which was mostly opinion evidence will not be disturbed on appeal, where there was ample room for difference in the conclusions to be drawn therefrom.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 27, 1914, upon findings in favor of the plaintiff, in an action to recover rent, tried to the court. Affirmed.

Severin Iverson, for appellant.

Lawrence Jack, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for Spokane county seeking a recovery of rent for a portion of a tract of land which he had purchased from the defendant, and which the defendant continued to hold possession of and occupy after the purchase and after the plaintiff was entitled to possession thereof. The case was tried before the court without a jury, resulting in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

There is no question here presented, worthy of serious consideration, other than the reasonable rental value of the portion of the land held possession of by appellant after the purchase thereof by respondent. This question must be determined wholly from oral evidence, the larger part of which is opinion evidence. It is in serious conflict, leaving ample room for difference in conclusions to be drawn therefrom. The statement of facts comprising only eighteen pages of typewriting, we have read all of the evidence therein, rather than depend on the abstract thereof prepared by counsel, and conclude that we would not be warranted in dis-

¹Reported in 145 Pac. 186.

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turbing the learned trial court's conclusion upon the question of reasonable rental value of the portion of the land which appellant retained possession of.

The judgment is affirmed.

Crow, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 12338. Department One. January 6, 1915.]

GERMAN-AMERICAN STATE BANK OF RITZVILLE *et al.*,

Appellants, v. MARY B. GODMAN, *Executrix etc.*,

Respondent.¹

WILLS—TESTAMENTARY DISPOSITION—PROPERTY SUBJECT—COMMUNITY PROPERTY. Community property is subject to testamentary disposition, to the extent of the testator's one-half interest, under Rem. & Bal. Code, §§ 1319 and 1342.

SAME—PROPERTY SUBJECT—PROCEEDS OF LIFE INSURANCE. Where policies of life insurance are payable to the insured's "executors, administrators, or assigns," or to "the estate of the insured" or to his "legal representatives," the proceeds are subject to testamentary disposition; the words legal representatives meaning ordinarily executors or administrators, and not differentiated from "the estate" in this connection.

EXEMPTIONS—PROPERTY SUBJECT—AVAILS OF LIFE INSURANCE. Under Rem. & Bal. Code, § 569, providing that the proceeds or avails of all life . . . insurance shall be exempt from all liability for any debt, the avails of life insurance policies payable to the insured's executors, administrators, or assigns, or to his estate or legal representatives are exempt from all the debts of the deceased, and of the estate or beneficiary at the time the proceeds become available.

EXECUTORS AND ADMINISTRATORS—EXPENSES—PAYMENT OF DEBTS—EXEMPT PROPERTY—LIFE INSURANCE. Rem. & Bal. Code, §§ 1464 to 1467, providing for the payment of the expenses of administration, and of the funeral and last sickness out of the property of the estate regardless of certain exemptions, has no application to the proceeds or avails of life insurance made payable to the deceased's estate, executors or administrators; in view of the later act, § 569, exempting the proceeds of life insurance policies from all liability for any debt.

¹Reported in 145 Pac. 221.

SAME—EXEMPT PROPERTY—SETTING ASIDE—WIDOW'S ALLOWANCE—LIFE INSURANCE. Rem. & Bal. Code, § 1466 *et seq.*, providing for certain exemptions to be set aside for the benefit of the widow and minor children, has no application to the proceeds or avails of life insurance which, by Id., § 569, is exempted from all debts; hence it is not necessary to order life insurance set aside to the widow as exempt.

WILLS—CONSTRUCTION—DIRECTION TO PAY DEBTS—APPROPRIATION—EXEMPT PROPERTY—INTENT. A general direction in a will to pay "all my lawful debts and the expenses of my funeral," is not an appropriation of the proceeds and avails of the decedent's life insurance policies which were payable to his executors, administrators, or assigns, or to his estate or legal representatives, in view of Rem. & Bal. Code, § 569, exempting such proceeds from all liability for any debts; since an intent to appropriate exempt property to the payment of debts must appear by clear and apt language, and the quoted words are but a common formula of wills respecting the payment of debts with funds legally applicable thereto.

WILLS—CONSTRUCTION—PAROL EVIDENCE. A will that is clear, definite and free from ambiguity cannot be either limited or extended by resort to parol testimony.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered April 8, 1914, applying the proceeds of life insurance policies to the use of a legatee, in a controversy with the administrator and creditors. Affirmed.

William O'Connor, for appellants.

Benton Embree, for respondent.

GOSE, J.—This litigation arose out of a controversy over the application of the proceeds and avails of certain policies of insurance upon the life of Henry E. Christensen, deceased. The policies in controversy amount in the aggregate to \$17,000. The administrator with the will annexed collected upon the policies \$15,739.28. The court held that \$14,537.83 of this amount was exempt from the debts of the insured, expenses of administration, and funeral expenses and expenses of the last sickness. The administrator and the German-American Bank of Ritzville, a corporation, intervener, and the guardian *ad litem* have appealed. The death of Judge Godman was suggested in this court, and Mary B.

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Godman, as the executrix of his last will and testament, was substituted as the respondent.

The admitted facts are as follows: Henry E. Christensen died testate June 1, 1912. He was then a resident of Franklin county in this state. He was married to Anna M. Christensen in 1901. The will was admitted to probate on the 24th day of June, 1912, and on that date James W. McBurney was appointed administrator with the will annexed upon the petition of the widow Anna M. Christensen, who was also named as executrix in the will. On the 7th day of July, 1909, Henry E. Christensen made his last will and testament which, after the formal recital that he was then of sound and disposing mind, provides: First: Nominates Anna May Christensen as executrix of the will. Second: "I hereby direct my executrix to pay all my lawful debts and the expenses of my funeral as soon as may be conveniently possible for her so to do after my decease." Third and fourth: Bequeathes the sum of ten dollars to each of his two children. Fifth: "The rest, residue and remainder of my estate, both real and personal and wherever located, I give, devise and bequeath unto my said beloved wife Anna May Christensen." Sixth: Directs that his will be executed and his estate settled without the intervention of any court except such as the law requires. Seventh: Revokes all former wills and testaments.

After the admission of the will to probate and the appointment of the administrator with the will annexed, the surviving wife, Anna M. Christensen, filed a petition in the estate, setting forth her marriage, the death of the deceased, and the issuance of the policies upon the life of the deceased after the marriage, averring that she claims one-half of the proceeds and avails of the policies as her community property and the other half thereof in virtue of the terms of the will. The administrator answered, setting forth the proceeds and avails of the policies which had come into his hands in the amount heretofore stated, and prayed for an order to pay all just debts. The German-American State Bank intervened and

alleged that the estate was indebted to it "in a large sum," and that the estate, aside from the insurance policies, was insufficient "to pay any appreciable part of the indebtedness of the estate." It further alleged that it was the intention of the testator to appropriate the proceeds and avails of the policies to the payment of his debts. These matters were put in issue by the answer of the surviving wife.

Three of the policies, aggregating \$12,000, were made payable to the insured's "executors, administrators or assigns;" one policy for \$2,000 was made payable to "the estate of the insured," and two policies aggregating \$3,000 were made payable to "the legal representatives of the insured." After finding the facts stated in this paragraph, the court allowed the administrator the following credits: (a) the reasonable expenses in making proof of death, \$112.40; (b) premiums paid upon the policies when the insured was insolvent, \$158.34; (c) statutory fees and compensation for collecting the policies, \$629.57, and (d) \$880, the amount theretofore paid by the administrator for the support of the widow and the two minor children. The court further directed the administrator to pay to each of the two minor children the sum of ten dollars, the amount of their respective bequests, and directed him to pay to M. M. Godman, as assignee of the widow, the sum of \$14,537.83.

The court found that the reasonable value of the funeral expenses was \$432.60, and that the reasonable expenses of the last sickness of the deceased amounted to \$35. These two items the court refused to deduct from the proceeds and avails of the insurance policies. Findings 16 and 17 are as follows:

"(16) That in his lifetime the said Henry E. Christensen realized that he was insolvent and he believed and said that his life insurance would be sufficient to pay his debts after his death."

The assignee excepted to this finding.

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"(17) The estate of the said deceased is now insolvent and will probably be insufficient to pay the funeral expenses and the expenses of the last sickness of said deceased."

We find no exception to this finding. The appellants excepted to certain conclusions of law.

(1) Whether the policies in controversy were community property we need not decide. They were subject to testamentary disposition to the extent of the testator's interest in them.

"Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate, . . ." Rem. & Bal. Code, § 1319 (P. C. 409 § 25).

Rem. & Bal. Code, § 1342 (P. C. 409 § 639) provides that one-half of the community property is subject to testamentary disposition. This principle was recognized in *Grigsby v. Russell*, 222 U. S. 149, where it was held that the rule of public policy that forbade the taking out of insurance by one on the life of another in which he has no insurable interest, does not forbid the assignment by the insured of a valid policy to one not having an insurable interest in his life.

"Where the insurance is payable to *the insured, or to his estate, or to his executors*, the proceeds may be bequeathed by him and will pass under a general or residuary bequest of his property." 1 Underhill, Wills, § 56.

"Policies payable to the assured or his legal representatives may be disposed of by him by his will as part of his estate. But policies otherwise payable cannot be so disposed of." 25 Cyc. 895.

The law does not differentiate between policies payable to the "executors, administrators, or assigns" and policies payable to "the estate" of the insured. *Mitchell v. Allis*, 157 Ala. 304, 47 South. 715.

The words "legal representatives" mean ordinarily "executors or administrators." *Sulz v. Mutual Reserve Fund Life Ins. Co.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; 25 Cyc. 887. A policy made payable to the "legal representa-

tives" of the assured may be bequeathed to his fiancée by the terms of a residuary clause in his will. *Walker v. Peters*, 139 Mo. App. 681, 124 S. W. 35. *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, impliedly recognizes this principle.

(2) The code, Rem. & Bal. § 569 (P. C. 81 § 881), provides "that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt." Counsel for the appellants say that our statute is *sui generis*, and, in criticism of it, say:

"We think if the legislature had given a little thought to the matter and had used a little judgment in passing the law, it would have read as follows: 'The proceeds of all life insurance shall be exempt to the beneficiary from all debts of the decedent.'"

The legislature, however, did not so provide. As was said by Judge Hadley in *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. 851: "It would be difficult to employ language more sweeping and comprehensive than that used in the statute." In that case, it was held that endowment policies in the hands of judgment debtors were exempt from seizure and sale in a proceeding supplementary to execution. It was contended that life insurance which has a present surrender value to the holder was not exempt from liability for his debts, and that the statute only protects insurance payable to a beneficiary other than the assured and which was intended for the protection of the family or other beneficiary without any present or prospective interest in the insured. This view was rejected. In *Holden v. Stratton*, 198 U. S. 202, in considering this statute, it was said that the amendment of 1897, page 70, Rem. & Bal. Code, § 569 (P. C. 81 § 881), extending the exemption of 1895, page 396, to accident insurance, together with the fact that the statute is broader in its terms than the statutes of most other states, "conclusively show the intention of the Washington legislature to adopt a broader and more comprehensive exemption."

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The statute received a liberal construction in *Northwestern Mut. Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326. In *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912 C. 994, in speaking of another statute, we said:

“When the language of the act is plain, free from ambiguity, and devoid of uncertainty, it is unanimously [universally] held that there is no room for construction, and that inconvenience following the enforcement of the law as expressed can have no weight in the construction of the statute.”

In *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, we said that it was the intent of the law to exempt the proceeds and avails of an insurance policy from the debts of the insured and from the debts of the beneficiary existing at the time the policy became available to him. A like rule of interpretation has been announced in other jurisdictions. *Bailey v. Wood*, 202 Mass. 549, 89 N. E. 147; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083; *Kimball v. Gilman*, 60 N. H. 54; *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720; *Bishop v. Grand Lodge of Empire Order of Mutual Aid*, 112 N. Y. 627, 20 N. E. 562. The statute is too plain to require construction. Any other interpretation than to follow the simple and direct mandate of the statute would be legislation.

(3) The appellants contend that the court erred in holding that the proceeds and avails of the policies were exempt from the expenses of administration, the funeral expenses, and the expenses of last sickness. Rem. & Bal. Code, §§ 1464 to 1467, inclusive (P. C. 409 §§ 323 to 329), is relied upon as supporting this view. These are old statutes which in terms except funeral expenses and expenses of administration from certain specific exemptions. The statute under consideration is a later one and contains no exceptions. These sections of the code have no application to the proceeds or avails of insurance policies.

When the proceeds and avails of the policies became available to the widow, they were exempt, not only from the debts of the insured, but from her debts existing at that time. *Reiff v. Armour & Co.*, *supra*. The argument implies that the fund was exempt from some debts, whilst the statute exempts it from all debts. The obligation of the estate to inter the remains of the deceased arose immediately upon his death. The policies came to the widow at the same moment as an exempt fund.

The question of the exemption of the proceeds of insurance policies was not involved or considered in *Butterworth v. Bredemeyer*, 74 Wash. 524, 133 Pac. 1061, or *Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768.

(4) It is further argued that, if the proceeds of these policies are exempt, they should have been set aside to the widow and minor children under the provisions of Rem. & Bal. Code, § 1466 *et seq.* (P. C. 409 § 327). These sections have no application to the proceeds or avails of insurance policies which have been bequeathed to a designated legatee. Although not relied upon by the appellants, it is equally plain that Laws 1909, p. 556, § 36 (Rem. & Bal. Code, § 6158), have no application to the facts in the case at bar. *Frost v. Frost*, 202 Mass. 100, 88 N. E. 446, 132 Am. St. 476, 27 L. R. A. (N. S.) 184.

(5) The appellants' main contention is that the direction to the executrix in the will to pay "all my lawful debts and the expenses of my funeral" is an appropriation of the proceeds and avails of these policies to those purposes. These are words commonly employed in a will. In construing a will it is the business of the court to discover the intention of the testator. It is almost universally held that a general direction in a will to the executor to pay the debts of the testator does not impress a trust upon exempt property bequeathed or devised to a designated person. The intention of the testator to appropriate exempt property to the payment of debts must appear by clear and apt language. The

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trial court said that the words in the will are only the common formula of wills, and that they merely direct the executrix to pay the debts and funeral expenses of the testator if there be sufficient estate "legally applicable thereto." We have no doubt of the correctness of the court's interpretation. *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337, 44 L. R. A. (N. S.) 1177; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560. In *Larson v. Curran*, the will, after the usual formal recitals, directed the executors "to pay out of my estate, as soon after my decease as shall be practicable, all the expenses of my last illness, all funeral expenses, and charges of all kinds relating thereto." Then followed this language: "It is my will and I hereby direct that all my just debts shall be paid out of my estate as soon as the same can be determined after my decease." This was followed by a devise and bequest of "all the rest, residue and remainder of my estate real, personal or mixed," to the testator's sister who was named executrix and given full power of sale both as devisee and as executrix. In holding that these words did not impress a trust upon exempt property, the court said:

"The general rule is that only property of the decedent that was unexempt in his lifetime is after his death subject to his debts, and we think that it is and ought to be the law that a general direction in the testator's will to pay his debts out of his estate, whether it precedes or follows in the will a devise of the exempt property, does not have the effect of charging the homestead with the payment of debts. The direction to 'pay all my just debts' 'out of my estate' is a purely formal phrase, commonly employed and really superfluous. To give it the meaning that it amounts to a direction by the testator that the homestead devised to his sister shall be charged with the payment of his debts would be to attach altogether too much significance to a well-worn stereotyped expression that really means nothing, any more than do the very common assertions by a testator that he is of sound mind, and aware of the uncertainties of this frail and transitory life."

Under statutes making real estate liable for the payment of debts of the testator if the personal estate is insufficient, it has been held that neither a general direction to the executor to pay debts nor a power of sale to pay the debts indicates an intention to charge the debts upon real estate. *Harmon v. Smith*, 38 Fed. 482; *Clift v. Moses*, 116 N. Y. 144, 22 N. E. 393; *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545; *Hamilton v. Smith*, 110 N. Y. 159, 17 N. E. 740; *Gates v. Shugrue*, 35 Minn. 392, 29 N. W. 57.

It has been held that real estate is not charged with the payment of legacies unless the intention of the testator to that effect is expressly declared or fairly or satisfactorily inferred from the language and disposition of the will. *Lupton v. Lupton*, 2 Johns. Ch. 614. It has been held that a general direction to an executor to pay a legacy "out of my estate" does not make the legacy a charge on the real estate which was devised in the residuary clause of the will. *White v. Kauffman*, 66 Md. 89, 5 Atl. 865. These cases hold that the same rules which would charge debts against real estate would also charge legacies against real estate. If the words employed in the will should be held to impress a trust upon exempt property, the widow and minor children, when the estate was small, might in many cases be left homeless and penniless.

The appellants have cited, among other cases in support of their view, *Kiesewetter v. Kress*, 24 Ky. Law 1239, 70 S. W. 1065, and *Union Trust Co. v. Cox*, 108 Tenn. 316, 67 S. W. 814. The *Kiesewetter* case seems to support their contention. In a later case in the same court, *McLean v. Trabue*, 142 Ky. 806, 135 S. W. 309, the court said that, under the statutes of the state, the homestead was subject to the debts of the testator the same as other property. It was the homestead that was involved in the *Kiesewetter* case. In *Union Trust Co. v. Cox*, the testator named an executor to "administer upon my estate" by the following methods: First, to pay all just debts. Second, to invest the balance

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of such funds as may remain as directed in the will. The will concluded with these words: "My estate (as a whole regardless of prior transfers) to be divided as above directed each one-third of my entire effects including all insurance." The policies were payable to the "executors, administrators and assigns." The court, after considering the peculiar phrasing of the will, reached the conclusion that it was the intention of the testator to appropriate the avails of his insurance policies to the payment of his debts.

We think that the sounder rule is, and it is practically the universal rule of interpretation, that the testator will not be deemed to have appropriated exempt property to the payment of his debts by a general direction in his will to pay debts, and that, before an intention to so appropriate exempt property will be ascribed to him, such intention must appear by clear and apt language.

The court permitted witnesses to testify that the deceased in his lifetime had said that he had sufficient insurance to pay his debts. Finding number 16, *supra*, was based upon this testimony. The will is clear, definite, and free from ambiguity, and its provisions cannot be either limited or extended by resort to parol testimony.

The judgment is affirmed.

CROW, C. J., PARKER, CHADWICK, and MORRIS, JJ., concur.

[No. 12375. Department One. January 6, 1915.]

PETER DAVID, *Appellant*, v. FIDELITY-PHENIX FIRE
INSURANCE COMPANY, OF NEW YORK, *Respondent*.¹

STIPULATIONS—PLEADINGS AND ISSUES—INSURANCE. In an action upon a fire insurance policy, in which the value of the property destroyed was placed in issue by a general denial, and an affirmative defense set up false swearing in the proofs of loss, in that the articles enumerated as destroyed were not in the house at the time of the fire, the question of the value of the property under the general issue is not eliminated by a colloquy between court and counsel in respect to the issues, particularly with reference to the matter pleaded in the affirmative defense, in which counsel for plaintiff stated that under the general issue plaintiff would have to prove that he sustained the loss alleged, but there was no charge of false swearing in the proofs of loss as to the value of the articles, and counsel for defendant acceded thereto, stating that if the property was in there, he was not going to state it "was not worth that amount;" the intention evidently being to limit the issue on the affirmative defense, and not eliminate the question of value on the general issue.

INSURANCE—PLEADINGS—DENIALS AND DEFENSES. Such a denial is not a "special denial" which would limit the general denial to the issues raised by the former; but is an affirmative defense in complete avoidance of the contract.

SAME—ACTIONS—ISSUES—INSTRUCTIONS. In an action upon a fire insurance policy, upon an issue as to false statements in the proofs of loss, it is proper to instruct that an innocent misrepresentation in the proofs of loss would not avoid the policy, but that a fraudulent misrepresentation would avoid it.

SAME—ACTIONS—INSTRUCTIONS—REQUESTS. Upon an issue as to false statements in the proofs of loss in an action on a fire insurance policy, an instruction that the jury must find that plaintiff knowingly and wilfully swore that the articles were in the house and destroyed by fire, when he knew they were not, with intent to defraud, is more comprehensive than a request to instruct the jury that the value set opposite the articles was immaterial, and justifies the refusal of such request.

SAME—ACTIONS—AMOUNT OF RECOVERY—VERDICT—JUDGMENT. In an action upon a fire insurance policy, a verdict for the plaintiff for less than the amount of the policy does not entitle the plaintiff to

¹Reported in 145 Pac. 199.

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judgment for the full amount of the policy, where the value of the property was in issue under the general denial, and defendant claimed that a large part of the insured property had been removed and was not destroyed by the fire.

SAME—ACTIONS—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY. In an action upon a fire insurance policy, the jury is not compelled to take the plaintiff's estimate of the value of the property claimed to have been destroyed by the fire, where the case rested largely upon opinion evidence, the items in the proofs of loss showed the character of the articles, the date of purchase, the cost price, and the plaintiff's estimated present value; as the weight of the evidence was for the jury.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Card, J., entered June 4, 1914, upon the verdict of a jury rendered in favor of the plaintiff for \$3,000, in an action upon a fire insurance policy. Affirmed.

Sachse & David (C. O. Bates, of counsel), for appellant.
Granger & Clarke, for respondent.

Gose, J.—This is an action to recover \$6,000, the amount of a fire insurance policy. There was a verdict and judgment in favor of the plaintiff for \$3,000, from which he has appealed.

On the 27th day of June, 1912, the respondent issued to the appellant a policy of insurance against loss by fire upon household furniture useful and ornamental, beds, bedding, linen, family wearing apparel, furs, plate, plated ware, printed books and music, piano, other musical instruments, portraits, pictures, paintings, tapestries, watches and jewelry, etc., then in the home of the appellant at Steilacoom in this state. On the 22d day of July following, the property was destroyed by fire. Proofs of loss were submitted and payment refused.

It is alleged in paragraph 4 of the complaint, that the personal property in the dwelling house "was totally destroyed by fire, and the plaintiff's loss on account of the destruction by fire at said time, of said personal property,

was and is the sum of six thousand and no-100 (6,000) dollars." The respondent in its answer denied "each and every allegation contained in paragraph 4 of said complaint." This is the form of general denial contemplated by the code, and put in issue the value of the property destroyed by the fire. Rem. & Bal. Code, § 264 (P. C. 81 § 235); *Peters v. McPherson*, 62 Wash. 496, 114 Pac. 188.

In its affirmative answer, the respondent alleges that the policy in litigation provides:

"This entire policy shall be void . . . in case of any fraud or fraudulent swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It is then alleged that the sworn proof of loss submitted by the appellant to the respondent was false and fraudulent, and was made for the purpose of deceiving the respondent and fraudulently obtaining from it the amount of insurance named in the policy. Upon the filing of the answer, the appellant moved the court to require the respondent to state in what respect the proof of loss was false and fraudulent. In response to the motion the court required the respondent to furnish the appellant a bill of particulars showing the items which it claimed were fraudulently included in the proof of loss. Thereupon the respondent filed a bill of particulars which states, "that with the exception of a few articles of furniture and a few books and a few kitchen utensils, the plaintiff swore falsely as to all of the items as set out in his proof of loss, in that said articles were not in the house at the time of the fire and were not destroyed by the fire." After the jury had been empaneled and sworn to try the cause, a colloquy occurred between court and counsel in respect to the issues, particularly with reference to the new matter pleaded in the affirmative defense. The discussion terminated in the following statements by respective counsel: Mr. Bates, for the appellant: "I think under the general issue we have to prove we sustained a loss to the amount of the policy,

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which you dispute, but I want it distinctly understood that there is no charge against us that we made any false or fraudulent swearing when we fixed the charges of the particular items," to which Mr. Clarke, counsel for the respondent, answered: "That is correct. If that property was in there, I am not going to say that it was not worth that amount. I don't know. It is up to them to prove it was there."

Upon the record as we have disclosed it, the appellant insists that the question of the value of the property was eliminated, and that the issue was narrowed to one question, viz., that of fraudulent swearing in respect to the presence of the property in the house at the time of the fire. We do not so understand the record. It seems clear that it was the intention of counsel that the appellant should be required to prove the value of the property upon the general issue, and that the respondent would make no claim that the false and fraudulent swearing extended to the question of value, but it would limit the inquiry under that issue to the single question whether or not the appellant, wilfully and with the intention of defrauding the respondent, falsely swore that the property was in the house at the time of the fire.

The appellant invokes the rule that, "when both a general denial and specific denials are employed in an answer, the scope of the general denial is limited to the issues raised by the specific denials." 31 Cyc. 694. This is a sound rule of pleading and practice, but, as we read the record, it has no application here. The affirmative defense is not a specific denial. It sets forth a clause of the policy which, if wilfully violated, avoids the policy *in toto*, and then alleges that the proof of loss was in fact false and fraudulent, and that it was made for the purpose of fraudulently obtaining the amount of insurance named in the policy.

It is claimed that the court erred both in giving and refusing to give instructions. The court instructed the jury, after correctly instructing as to the burden of proof, that if they should believe from the evidence that the property cov-

ered by the policy was owned by the appellant at the time of the fire, that it was destroyed by the fire, and that the appellant did not wilfully make false statements in his proof of loss, "then the plaintiff is entitled to a verdict against the defendant for such sum as you find was the fair cash market value of said property destroyed." The criticism of this instruction is, as we understand it, that the question of value had been eliminated by stipulation. This question has already been disposed of.

The court instructed the jury that, if they found from the evidence that the appellant in his proof of loss which he submitted to the respondent wilfully made false and fraudulent statements for the purpose of deceiving it, there could be no recovery. The court was equally explicit in instructing the jury that, if they should find that some of the property mentioned in the proof of loss was not in the house at the time of the fire, such fact would not avoid the policy, unless they found further that the misrepresentation was made wilfully and with the intention of deceiving and defrauding the respondent. In short, the court instructed the jury that an innocent misrepresentation in the proofs of loss would not avoid the policy, but that a fraudulent misrepresentation therein would avoid it.

The appellant assigns error in the court's refusal to instruct the jury to the effect, that the value set opposite the various items in the proof of loss was immaterial "and cannot be considered by you on this affirmative defense." The court did instruct the jury that "you must find by a fair preponderance of the evidence that the plaintiff knowingly and wilfully in his proof of loss swore that certain articles were in the house and destroyed by fire, when as a matter of fact he knew they were not, with the intention thereby of defrauding the insurance company," in order to avoid the policy. We think the instruction given embraced all the material matter contained in the requested instruction. It was more

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comprehensive in that it eliminated every element except that of fraudulent swearing in respect to the property that was in the house at the time of the fire.

It is earnestly contended that the court erred in denying the appellant's motion for a judgment for the full amount of the policy after the coming in of the verdict. The appellant and his wife swore that the property destroyed by fire was worth considerably more than \$6,000. The respondent's testimony was directed to circumstances which it conceived tended to show that a large part of the property had been removed from the house before the fire and that the appellant had been guilty of false swearing. It is argued, and we think correctly, that the jury exonerated the appellant upon the charge of wilful false swearing. It does not follow, however, that the jury were compelled to accept the appellant's estimates of value. The appellant's testimony upon the question of value was nonexpert, opinion evidence. The value of opinion evidence necessarily depends upon the facts which form the basis of the opinion. These facts were before the jury. The itemized statement of the articles which the appellant claims to have lost in the fire and which were made a part of his proofs of loss covers twenty-seven typewritten pages. In the main, these items show the character of the article and the date of the purchase, and, in parallel columns, the cost price of the article and its estimated present value. Some of the articles were purchased in 1909, others in 1910, others in 1911, others in 1912. For illustration, one Morris chair was listed as having been purchased in 1909 for \$35, and the present value was estimated at \$35. The jury, having before them the character of the articles, the date of purchase, the purchase price, and the estimated present value, were not compelled to adopt the opinion of any witness as to the present value of the articles. They had before them all the facts, upon which the appellant's witnesses estimated the values, and they were at liberty to determine the value upon

all the evidence. The weight of the evidence was for the jury and not for this court. From the entire record, we think the judgment should be affirmed.

Crow, C. J., MORRIS, and PARKER, JJ., concur.

[No. 11782. Department One. January 7, 1915.]

CATHERINE A. SNELL, *Appellant*, v. H. JACOB STELLING
et al., *Respondents*.¹

STIPULATIONS—OPERATION AND EFFECT—ACTIONS—ISSUES—BOUNDARIES. In an action of ejectment and to quiet title, a stipulation setting forth two deeds, with descriptions of the disputed boundary line, by courses and distances, and reciting that by mesne conveyances, the plaintiffs had succeeded to the right and title conveyed by one of the deeds, and the defendants the other, eliminates the claims of all title by adverse possession by either side to the lands described in the deeds, and reduces the action to one in its essence to restore a lost boundary as contemplated in Rem. & Bal. Code, §§ 947-949.

ADVERSE POSSESSION — DISPUTED BOUNDARY — MISTAKE. Where neither of two adjoining landowners intends to claim beyond the true boundary line set out in their deeds, possession by mistake to an erroneous line does not work a disseisin as against the other under the seven-year statute, Rem. & Bal. Code, §§ 786, 788, by possession under color of title and payment of taxes.

BOUNDARIES—LOST LINES—ESTABLISHMENT—ACTIONS — SURVEY—PAROL EVIDENCE. Where two deeds, executed at the same time, describe the dividing boundary line between the tracts conveyed by courses and distances, and there is no defect or patent or latent ambiguity in either description intimating that the lines would not coincide, if completed surveys were made, in an action reduced in its essence to restore the lost boundary, it is error to attempt to establish the location of the boundary line by oral evidence until after commissioners have been appointed under Rem. & Bal. Code, § 948, to make a survey and plat to restore the lost boundary, if it can be done; oral evidence being admissible only after it is found that, by a complete survey, the two descriptions of the boundary in dispute do not coincide.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 8, 1913, in favor of

¹Reported in 145 Pac. 466.

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the defendants, after a trial on the merits before the court without a jury, in an action of ejectment and to quiet title. Reversed.

Chapman & Bailey and *B. F. Jacobs* (*W. H. Snell*, of counsel), for appellant.

Blackburn & Gielens, for respondents.

ELLIS, J.—The plaintiff brought this action to eject the defendants from, and to quiet title to, a narrow strip of land which she claims as a part of her property, and especially to enjoin the defendants from interfering with her use of a spring located upon the disputed strip. As a first cause of action, she claims title by deed from prior owners, dated December 1, 1899, conveying a certain tract of land described by metes and bounds as in the first description in the stipulation to which we shall presently refer; avers that the north boundary of this tract ran along a rail and brush fence about 40 feet north of the spring; that in September, 1904, by pipes, she connected this spring with a water system installed upon her farm, and has since used the water for domestic and farm purposes; that about December 1, 1912, the defendants entered upon the land and erected a fence 80 feet south of the north boundary line thereof, cutting the plaintiff off from the spring, threatening to disconnect the pipes, and claiming title to the strip so fenced off. For a second cause of action, it is alleged that, about December, 1899, the plaintiff appropriated the waters of the spring for the watering of her stock, and in September, 1904, permanently appropriated the water by means of pipes, and claims title by adverse possession and payment of taxes each year for more than seven years last past "upon said property."

The defendants, by answer, denied that the plaintiff is, or ever was, the owner of or in possession of any part of a certain tract of land which is described by metes and bounds substantially as the second description in the stipulation

hereinafter set out. Practically all of the allegations of the complaint are denied, save that the defendants admit that they erected the wire fence and claim that it is on the true boundary line between the two tracts. It is then averred by way of cross-complaint that a certain tract of land, described as in the second description in the stipulation referred to, was conveyed by one Darius M. Ross and wife on April 21, 1888, to one Elbridge Bartlett, and through mesne conveyances and by deed dated March 21, 1908, conveyed to the defendants; that the land so conveyed is the same land described in their answer; that the spring in controversy is located upon their land so described at a point about twenty feet north of its south boundary; that they and their predecessors in interest have been the owners thereof, and in actual open and uninterrupted possession thereof, and claiming adversely under color of title for more than ten years, and have paid all the taxes on the land so described. It is also averred that the plaintiff, on December 6, 1899, took an assignment of a certain mortgage upon the lands now belonging to the defendants, and by written release satisfied the same in October, 1901, and is thereby estopped to claim title to any part of the land so described. The defendants pray that title to the land upon which the spring is located be quieted in them. The reply puts in issue the affirmative allegations of the cross-complaint.

The trial was to the court without a jury. Immediately after entering upon the trial, the plaintiff offered in evidence a written stipulation to which we have referred. It was received without objection. Omitting caption, it reads:

"It is stipulated by and between the parties hereto, as follows:

"(1) That on and prior to the 21st day of April, 1888, Darius M. Ross and Eliza J. Ross, his wife, were the owners of and in the possession of all of the property hereinafter described, a part of which is now in dispute between the parties in this action.

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"(2) That on said day said Darius M. Ross and wife made, executed and delivered a deed to a part of the property by them owned as aforesaid to Albert S. Ross. The property conveyed to said Albert S. Ross, being described in said deed as follows:

"Beginning at the quarter section corner on the east side of section 30, township 20, N. R. 4 E. of W. M., thence north $88^{\circ} 15'$ west var. 22° E. along center line east and west of section 30, 60 chains to the west 1-16 line of the section, thence north var. 22° east 6 chains and 50 links to a stake, thence south $88^{\circ} 15'$ east 33 chains and 40 links to a stake, thence north 56° east 36 chains and 44 links to the left bank of Clark's creek, thence with the meander of the left bank of Clark's creek, and extending to the center of Clark's creek.

"South 35° East 0.93 chs.

"South 49° East 3.28 chs.

"South 77° East 3.00 chs.

"North 89° East 2.70 chs.

thence south $42^{\circ} 30'$ east 3.24 to a stake on the left bank of Clark's creek, thence south 35° west 26 chains and 1 link to the place of beginning, containing 84 acres more or less. Which deed was recorded on the 23rd day of April, 1888, in book 30 of deeds at page 57 of the deed records of Pierce county.

"(3) That on said 21st day of April, 1888, said Darius M. Ross and wife made, executed and delivered a deed to a part of the property by them then owned as herein set forth to Eldridge Bartlett, also known as Elbridge Bartlett; the property in said deed to Eldridge Bartlett being described as follows:

"Beginning at the intersection of the west 1-16 line of section thirty (30) township twenty (20) north of range four (4) east of the Willamette Meridian with the boundary line on the south side of the Puyallup Indian Reservation which is a government corner, properly witnessed thence north seventy degrees (70°) east var. 22° east along said reservation line sixty-three chains and seven links (63.07 chs.) to the intersection of the east line of section thirty (30) with the Indian Reservation line, thence south 3.30 chains to the left bank of Clark's creek, south $47^{\circ} 45'$ east 3.87 chains, south 17° east 1.74 chains, south 35° east 1.66 chains to a stake on the left bank of Clark's creek, thence south fifty-six de-

grees west thirty-six chains and forty-four links to a stake, thence north eighty-eight degrees and fifteen minutes ($88^{\circ} 15'$) west thirty-three chains and forty links (33.40 chs.) to stake on the west 1-16 line of section thirty (30) thence north six chains and forty links (6.40) to the place of beginning, and containing eighty-four (84) acres more or less. Which deed was recorded May 15, 1889, in book 36 of deeds at page 375 of the deed records of Pierce county, Washington.

"That by virtue of mesne conveyances and proceedings the plaintiff herein has succeeded to the right and title of said Albert S. Ross in the land so conveyed to him, and the defendants herein have succeeded to the right and title of said Eldridge Bartlett in the land conveyed to him as herein set forth.

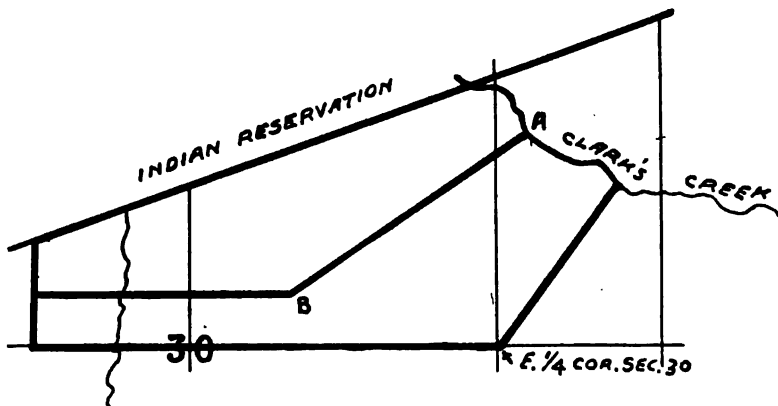
B. F. Jacobs—Chapman & Bailey,

"Attorneys for Plaintiff.

"Blackburn & Gielens,

"Attorneys for Defendants."

The evidence is voluminous. We can give only its purport. We here reproduce a plat of the lands drawn by one Wheeler, who made a partial survey with a view to determining the dividing line between the two tracts in December, 1901. This bare outline was all that was offered in evidence of this Wheeler survey. No field notes were produced. Wheeler is now dead. The plat is reproduced merely to illustrate the evidence.



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The plaintiff's husband testified that this Wheeler survey placed the spring on the plaintiff's land. The plat itself, however, is silent on the subject. This survey is of little probative value; no distances are marked, nothing to show the starting point nor how the various corners, lines and angles were located.

In 1908, the plaintiff procured a partial survey of the dividing line between the two tracts by one Funk, then county surveyor. The plat of this survey, which is in evidence, places the spring about twenty-three feet south of the dividing line and on the appellant's land. Funk testified that he ran this line from the plaintiff's deed. There is no evidence that he ran all the lines in that deed or attempted to locate all the corners and monuments. The other parts of the plat were drawn by mere computation. He began at the east quarter corner of section 30, ran thence west along the east and west center line of the section to what he computed to be the west 16th corner of that section on that line, ran thence north 6.5 chains or 429 feet, thence east, parallel with the east and west center line of the section, 33.4 chains, the distance of the 3d call in the deed. There is no evidence that from there on he ran any of the other lines.

In October, 1912, the plaintiff had a third partial survey made by one Webb. This line like the other was a survey only to establish the west part of the dividing line according to the third call of the plaintiff's deed. It was made in the same way as the Funk survey. Webb testified that this line runs 15.1 feet north of the spring, thus disagreeing by something over eight feet from the location of the spring with reference to the line as shown upon Funk's plat. Webb testified that, by reversing the calls in the defendant's stipulated deed, that is, running the last call first, the west part of the dividing line which he surveyed would almost coincide with his survey. He states, however, that he did not survey the east part of the tract, nor attempt to locate the intersection of

the dividing line with Clark's creek according to the calls in either deed.

In November, 1912, the defendants had the dividing lines between the two tracts surveyed by one Nicholson. The lines were actually run by Joseph Bell, a man in Nicholson's employ, but were checked up by Nicholson from Bell's field notes. Both Bell and Nicholson testified that they began at the east quarter corner of section 30, ran thence north to the intersection of the east line of section 30, with the southerly line of the Puyallup Indian Reservation for a point of beginning. Thence following the calls in the defendants' deed from that point, they located the point on the left bank of Clark's creek, called for in the defendants' deed as the beginning of the dividing line; thence following the courses and distances in the defendants' deed, ran a line in a southwesterly direction to the brow of the hill; thence, following the calls and distances in the deed, ran the line west to what they claim is the west 16th line of section 30. This line so found, although parallel with the east and west center line of section 30, is several feet south of the line as located by Funk and Webb, and extends a few feet beyond the west 16th line of section 30 as located by Funk and Webb. The spring is about twenty feet north of this line.

From their computations, but not by actual survey, both Nicholson and Bell testified that the dividing line if run completely according to the calls and distances of the plaintiff's deed, continuing from the point where the Webb survey actually ended, diagonally across the bottom land for the distances called for in the deed, would extend the line several feet across Clark's creek. So far as the evidence of these various surveys goes, it tends to establish the fact that neither the description in the stipulated deed of the plaintiff nor the description in the stipulated deed of the defendants would close when actually surveyed upon the ground, and that the division lines as described in the two deeds do not coincide.

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There was evidence of a survey prior to any of these. That survey was made by one Miller in the spring of 1888, and was for the purpose of dividing the entire tract, including the lands claimed by both parties, between Albert S. Ross and Elbridge Bartlett, the grantees mentioned in the stipulation, under the following circumstances: Darius M. Ross owned all of the land. Albert S. Ross, his son, and Eldridge Bartlett, his son-in-law, had purchased the land from him. They desired to divide it as nearly as possible equally, yet so that each would have one-half of the more valuable bottom land. Three arbitrators, selected in the usual manner, made the division with the assistance of the surveyor Miller. The result was the two descriptions in the deeds to Albert S. Ross and Elbridge Bartlett substantially as set out in the above stipulation. Miller, however, made no plat nor, so far as the record shows, were his field notes preserved otherwise than as recited in the two deeds. He was not produced as a witness.

One of the arbitrators, Frank R. Spinning, and Albert S. Ross and his brother Charles H. Ross, both of whom assisted in the survey, testified that this survey and division, as marked upon the ground at the time, placed the dividing line between the two tracts south of the spring in dispute so that the spring fell upon the Bartlett tract. All of these witnesses claim to remember that fact because Albert S. Ross was particularly desirous of getting the spring, but did not get it. They all testified that the arbitrators selected as a starting point for the dividing line a point on the left bank of Clark's creek where a stake was set. For convenience of illustration, we have marked this point "A" on the plat. Thence they ran the line in a southwesterly course to the brow of the hill, so as to divide the valuable bottom land as nearly as possible equally. At the point reached by this course on the brow of the hill, a stake was set, this point we have marked "B." The dividing line was run thence west in a straight line to the western boundary of the entire tract. The Ross brothers

testified that this line was marked on the ground at the time by blazing the trees. There were slight evidences of this blazed line at the time of the trial. There was clear evidence, however, that, shortly after the division, Albert S. Ross and Eldridge Bartlett built a fence, along what they both conceded to be their dividing line, from the stake on the left bank of Clark's creek to the point on the brow of the hill where the line turned west. At the time of trial, there were seven or eight panels of old post and rail fence running west from the end of the old diagonal fence. There were distinct evidences of both of these old fences on the ground at the time of the trial. There were slight evidences of an old brush fence extending a little distance further west in an irregular line. If extended in its general direction it would pass to the south of the spring. The court, evidently conceiving that the conflicting surveys demonstrated the ambiguity of the two deeds when applied to their subject-matter, so as to admit of extrinsic evidence, took the angle where the old fence across the bottom land met the seven panels of post and rail fence as the point on the hill to which the call from the stake on Clark's creek was intended in the original division to run, and thence ran the line west to the west boundary of the two tracts. This line ran between the Webb and Nicholson lines, but placed the spring in controversy on the respondents' land. The decree went accordingly, save that, it appearing that the plaintiff in 1901 had built a new fence five feet north of the line of the old fence diagonally across the bottom land, she was accorded that five-foot strip. The plaintiff appealed.

We shall not attempt a discussion of the various claims of error assigned, since they resolve themselves into the single claim that the trial court should have established the line of the Webb and Funk survey as the dividing line, and that parol evidence was inadmissible to establish the location of the line on the ground at the time of the original division between Ross and Bartlett. Some of the questions, elaborately discussed, are eliminated by the stipulation which we have set

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out. This stipulation, deliberately entered into at the outset, narrows the issues presented by the pleadings by eliminating all claim of title on either side, save that taken by Albert S. Ross on the one hand and by Bartlett on the other by their respective stipulated title deeds. It eliminates the plaintiff's claims of title by adverse possession with payment of taxes under the seven-year statute, Rem. & Bal. Code, §§ 786, 788 (P. C. 81 §§ 1373, 1377), because it limits her color of title to the description in her title deed, and limits her entire claim of title, rightful possession and payment of taxes to that land. *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073. It is not pretended that she has paid taxes by any other description than that included in her title deed.

On the other hand, it limits the defendants' claims of title in the same way, since by this stipulation they claim rightful possession of no more than is included in the description in the stipulation as the Bartlett land.

"Where neither party intends to claim beyond the true line, possession, up to what is erroneously supposed to be the true dividing line between adjoining proprietors, will not work a disseisin in favor of either of any land occupied by him under such erroneous belief." 2 Devlin, Deeds (2d ed.), p. 1457, § 1037.

See, also, *Milbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053; *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836, 33 L. R. A. (N. S.) 903.

It is true that possession originating in a mistake may become adverse. That, however, is a question of fact. There must be some evidence of a hostile intent and facts imposing notice of that intent to initiate an adverse holding. *Johnson v. Ingram*, *supra*; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936. There is no such evidence in this case.

We are clear that this narrowing of the issues is the inevitable effect of this stipulation and that the whole dispute must be solved by the application of these two descriptions to the ground itself, if by a complete survey according to the

calls, monuments and distances in each stipulated description they can be made to enclose the respective tracts so that the north line of the one shall coincide with the south line of the other. If this can be done, this dividing line, wherever it falls is, by this stipulation, conceded to be the correct dividing line, and the right and title to the waters of the spring must be adjudged accordingly. If this cannot be done, but only then, parol evidence would be admissible to determine where the dividing line was intended to be, and where it was actually placed upon the ground and acquiesced in by Ross and Bartlett when the division was made. Had there been clear evidence that the descriptions cannot by actual survey be so applied to the land as to fix the dividing line, we would deem the parol evidence sufficient to establish this line where the trial court placed it. The parties have, in effect, stipulated that the plaintiff stands in the shoes of Albert S. Ross and can claim nothing more than Ross could claim against Bartlett, and that the defendants stand in the shoes of Bartlett and can claim nothing more than Bartlett could have claimed against Ross. The last paragraph of the stipulation makes this plain. The fact that the deed to Albert S. Ross was first recorded is, therefore, immaterial. Both deeds were of record when the parties here acquired their respective lands. The deeds were executed on the same day under circumstances showing a clear intention of all concerned that they should be simultaneously delivered. In short, this stipulation reduces the action to one in its essence to restore a lost or uncertain boundary, as contemplated by the statute touching such cases. Rem. & Bal. Code, ch. 8, §§ 947, 948, 949 (P. C. 57 §§ 1, 3, 5).

It is obvious that parol testimony should be inadmissible to establish this common boundary line unless there is some defect or ambiguity in one or both of the stipulated descriptions. There is no patent ambiguity appearing upon the face of either description, nor do we believe that it can be fairly said that the partial surveys in evidence demonstrate

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with any degree of certainty that there is a latent defect or ambiguity in either description when laid upon the ground. So far as the record shows, no survey since the Miller survey, made for the purpose of dividing the land, was a complete survey running all of the boundaries of both or either tract according to the monuments, calls, courses and distances included in both or either description. Since the action has been reduced in its essence to one to restore a lost or uncertain boundary, we think the case is one peculiarly calling for the appointment of disinterested commissioners to make a complete survey of both tracts upon the ground with a view to establishing the common boundary between the two tracts, if it can be done by a survey following the descriptions, and in any event returning to the court a plat of their survey with their field notes together with their report. The discretion to appoint commissioners for that purpose is clearly given by the statute, Rem. & Bal. Code, § 948, and we think, under the state of the record now before us, that had such an application been made by either party in the court below, a refusal to follow that course would have been an abuse of the discretion.

We are therefore of the opinion that the decree should be vacated, and the cause remanded with directions to the trial court to open the case for further evidence, appoint three commissioners, as provided in the above mentioned statute, for the purpose of surveying the land and, upon their return of such survey, to take their testimony and consider the same in connection with all of the testimony touching the several surveys admitted at the former trial. If from this testimony the court is satisfied that the two stipulated descriptions by an actual complete survey cannot be harmonized so that the south line of the one will coincide with the north line of the other, he shall then consider the parol testimony relative to the original establishment of the line upon the ground and the acquiescence of Ross and Bartlett therein

as properly admitted, and upon the whole record so supplemented make his decree.

We deem it proper to state that since neither party is seeking a reversal of this decree in so far as it establishes the present fence of the appellant across the bottom land as a boundary line, to that extent the line may be considered as agreed to, but, of course, not for the purpose of locating the remainder of the dividing line running thence west.

The decree is reversed, and the cause is remanded for further proceedings in accordance with this opinion. Neither party will recover costs on this appeal.

Crow, C. J., CHADWICK, GOSK, and MAIN, JJ., concur.

[No. 11871. Department One. January 7, 1915.]

J. W. STUDEBAKER *et al.*, *Appellants*, v. JOHN BEEK *et al.*,
Respondents.¹

DEEDS — CONSTRUCTION — RESERVATIONS AND EXCEPTIONS. While there is a technical legal distinction between an exception and a reservation, they may be used as synonymous, if necessary to effectuate the intention of the parties; and ambiguity created by the use of both expressions should be resolved by reference to the nature of the thing reserved or excepted.

ESTOPPEL—BY DEED—BOND FOR DEED—PERFORMANCE—ACCEPTANCE. Having accepted a deed with a reservation, in performance of a bond for a deed without any reservation, and canceled the bond on the records, the grantees are not in a position to insist that the reservation was improperly inserted in the deed, there being no suit to reform the deed.

DEEDS — CONSTRUCTION — EXCEPTIONS AND RESERVATIONS—SCOPE—FEE EXCEPTED FROM RIGHT OF WAY EASEMENT. Where an easement for a right of way had been granted to a railroad reserving the fee simple to the grantors, and the railroad went into possession, a subsequent deed of the entire tract, "reserving and excepting" "a strip of land" describing the same by reference to the right of way deed,

¹Reported in 145 Pac. 225.

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did not convey the fee reserved in the railroad right of way deed; as the reservation therein referred to the grantor's fee in the right of way.

SAME. Where, after granting a railroad right of way easement, excepting and reserving the fee, the grantors conveyed a tract to the company for a depot site upon a condition that was never performed, a deed from the railroad company reconveying the depot site for nonperformance of condition, but excepting and reserving the right of way described by reference to the original right of way deed, reinvested the original grantors with all their title at the time the depot site was first conveyed, including the fee simple in the railroad right of way, as originally excepted; and the company could not thereafter convey the fee of that strip, upon abandonment of its right of way.

SAME—RESERVATIONS AND EXCEPTIONS—CONSTRUCTION. A reservation in a deed by a grantor of the fee in a strip of land to which the grantor never had legal title, does not in equity reserve anything; while the reservation in the same words by a grantor who had both the legal and equitable title to the fee will effectually reserve the same, as the relation of the parties to the subject-matter is different, and the equities of all the parties must be considered.

EQUITY—LACHES—DELAY. Having in 1879, accepted a deed with a reservation in full satisfaction of a bond for a deed, it is now too late to assert any equitable claim by reason of the terms of the bond.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered December 12, 1913, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

O'Neill & Spaulding, for appellants.

Miller, Crass & Wilkinson, for respondents.

ELLIS, J.—This is an action to quiet title in the plaintiffs to a strip of land formerly occupied as a railroad right of way. The evidence was chiefly documentary, consisting of instruments the parts of which, hereinafter chronologically set out, constitute the essential facts.

(a) On December 12, 1870, John Beek and Jane Beek, the then owners of a donation land claim where the town of Castle Rock, in Cowlitz county, is now located, conveyed to

the Northern Pacific Railroad Company an easement for a right of way, described as follows:

"The right-of-way for the construction of a railroad and telegraph line to the extent of 200 feet wide, of land, on each side of said railroad, along the entire of said railroad as located, or to be located, across on hereinafter described lands and premises, and the right, power, authority, to take from our said lands adjacent to the line of said railroad material of earth, stone and timber for the construction thereof, to-wit: Reserving always the fee simple to said lands and premises, it being understood that the use of the land for said railroad purposes is all that is conveyed by this instrument to-wit: Our Donation Claim Certificate No. 12, Notification No. 1243, as designated on the plats and records of the U. S. Land Office at Vancouver, W. T., containing 315-80-100 acres, being: [here follows a particular description of the donation claim.]"

(b) On December 19, 1871, the same grantors conveyed by bargain and sale deed to the Northern Pacific Railroad Company by specific description a part of the donation claim containing 45.25 acres, upon condition as follows:

"This deed is given upon the express condition that the said Northern Pacific Railroad Company, party of the second part, construct a station and depot upon the line of its railroad upon the above described premises, with proper and usual facilities and accommodations for passengers and freight, and maintain the same permanently."

(c) On February 20, 1878, the railroad company reconveyed to John Beek by quitclaim deed the same 45.25 acres of land last above mentioned, with the following reservation:

"Reserving and excepting therefrom, however, a strip of land extending through the same or so much of said strip of land as may be within said described premises of the width of four hundred feet, that is, two hundred feet on each side of the center line of the Northern Pacific railroad as conveyed by said party of the second part to said party of the first part, for right-of-way, by deed dated the twelfth day of December, A. D. 1871."

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(d) Prior to the execution of the deed last mentioned, John Beek executed to one George R. Pyle a bond for a deed, providing that, upon the payment of the purchase price, John Beek would convey to Pyle or his legal representatives or order the entire donation claim by particular description, followed by no reservation or exception, and reciting "containing three hundred and fifteen acres and eighty-hundredths of an acre, more or less." Across the face of the record of this instrument was written "Cancelled by deed dated June 12, 1879."

(e) On June 12, 1879, John Beek and Jane Beek, his wife, executed to James Studebaker a deed conveying by particular description the entire donation claim, reciting "containing 315-80-100 acres, more or less," and followed by a reservation and exception which reads:

"Reserving and excepting therefrom, however, a strip of land extending through the same or so much of said strip of land as may be within said described premises of the width of four hundred feet, that is, two hundred feet on each side of the center line of the Northern Pacific railroad as conveyed by said John Beek and Jane Beek, his wife, to the Northern Pacific railroad company for right-of-way by deed dated the twelfth day of December, A. D. 1870."

(f) On April 18, 1913, the Northern Pacific Railroad Company executed to one Joseph O'Neill a quitclaim deed of the abandoned right of way across the Beek donation claim. This deed, it is admitted, was given for the benefit of all of the plaintiffs. It was also admitted that the railroad company has recently abandoned this part of its former right of way and removed its tracks therefrom.

The evidence showed that the plaintiff James Studebaker was a son-in-law of Pyle and a partner in the purchase of the Beek donation claim. Studebaker testified that the deed from Beek and wife to him, dated June 12, 1879, was given in compliance with the bond for deed from John Beek to Pyle. It was admitted that the other plaintiffs are the heirs at law of George R. Pyle, who is now dead, and that what-

ever interest they have in the premises comes through the deed to Studebaker. It was admitted that John Beek and Jane Beek both died intestate some years ago, and that the defendants John Beek, Joseph Beek and Mrs. Price were their heirs at law. It is admitted that Mrs. Price has not been heard from for over seven years and that she probably lost her life in the San Francisco fire. She left no issue. John and Joseph Beek are her only heirs. Joseph Beek alone answered. The court found that he is the owner of an undivided one-third interest in the property as heir of John and Jane Beck, and of an undivided one-half of the undivided one-third inherited by Mrs. Price. Decree was entered accordingly, quieting his title to those interests and denying the plaintiffs any relief as against him. The plaintiffs appealed.

The appellants' claims of error are all, so far as material, directed to three points: (1) That the deed from John Beek and wife to the appellant Studebaker, instrument (e), should have been construed in connection with the bond for deed from the Beeks to Pyle, instrument (d), as conveying the fee of the right of way then occupied by the railroad company and reserved to the Beeks in their original deed to the railroad company, instrument (a); (2) that the second deed from the Beeks to the railroad company conveying the 45.25-acre tract, instrument (b), conveyed to the railroad company the fee of the right of way which had been reserved to the Beeks in their original deed of the easement to the railroad company, instrument (a), and the deed from the railroad company of this 45.25 acres back to the Beeks, instrument (c), reserved to the railroad company the fee of the right of way, so that the deed from the railroad company to O'Neill, instrument (f), of the abandoned right of way conveyed the fee title of that strip; (3) that because the reservation in the deed from the Beeks to Studebaker, instrument (e), was couched in the same terms as the reservation in the deed from the railroad company to the Beeks of the

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45.25 acres, instrument (c), this reservation inured to the benefit of Studebaker, carrying whatever rights the Northern Pacific Railroad Company had reserved to the Beeks.

I. The claim that the deed from Beeks to Studebaker should be construed in connection with the bond for a deed from Beek to Pyle, is based upon the contention that the reservation in the deed from the Beeks to Studebaker is ambiguous, in that it contained the words "reserving and excepting" as applied to the strip of land here in question. It is urged that the deed should be construed together with the bond for a deed in fulfillment of which the deed was given. The bond for a deed contained no reservation or exception whatever. It is claimed, therefore, that the reservation and exception in the deed was a mere reservation to the railroad company of the easement for a right of way which, when abandoned, passed by the deed and the bond for a deed to Studebaker. This court said, in *Biles v. Tacoma, Olympia & Grays Harbor R. Co.*, 5 Wash. 509, 32 Pac. 211:

"While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved. Martindale on Conveyancing, p. 106, § 118. An exception is a clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description. The part excepted is in existence at the time of the grant, and remains in the grantor unaffected by the conveyance. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. 5 Am. and Eng. Enc. of Law, 1, 455, Title, 'Deeds'; Tiedeman on Real Property, § 843. But frequently the words exception and reservation are used as synonymous, and the term exception will be held to mean reservation whenever it may be necessary to effectuate the intention of the parties to the instrument."

Assuming, therefore, that the use of the words "reserving and excepting" in the Studebaker deed created an ambiguity, that ambiguity must be resolved, not by any technical definition of the words "reserving and excepting," but by the nature of the right or thing reserved or excepted. See, also, *Delano v. Luedinghaus*, 70 Wash. 573, 127 Pac. 197. The evidence shows that, when the bond for a deed was given by the Beeks to Pyle, the records showed that the Beeks, in their original deed of the easement for a right of way to the railroad company, had reserved the fee of the right of way to themselves, the language in that deed being "reserving always the fee simple to said lands and premises, it being understood that the use of the land for said railroad purposes is all that is conveyed by this instrument." Studebaker, for himself and the Pyle heirs, accepted the deed containing a reservation and exception of this right of way in satisfaction of the bond for a deed to Pyle. This is not a suit to reform the deed to correspond with the bond. Having accepted the deed in satisfaction of the bond, and permitted the bond to be canceled of record, Studebaker and the Pyle heirs are now in no position to insist that the reservation was improperly inserted in the deed. Construed with reference to the definitions of reservation and exception above quoted from the *Biles* case, it would seem that the words "reserving" and "excepting" were both properly used. At the time the deed to Studebaker was made, the railroad company was occupying the right of way with its track and enjoying the easement therein. The deed of the right of way having reserved to the Beeks the fee therein, the reservation and exception in the deed to Studebaker from the Beeks should be construed as a reservation of the fee of the right of way to the Beeks, and an exception of the easement in the right of way to the railroad company. While there cannot be with technical correctness both a reservation and an exception of the same thing, as pointed out in the *Biles* case, the nature of the things reserved and excepted in this instance shows

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that there was a separate subject-matter upon which each of these terms could operate, the reservation upon the fee of the right of way reserved to the Beeks, the exception upon the easement of the railroad company in the right of way which had been conveyed to the railroad company. It seems plain, therefore, that, when applied to the subject-matter, this deed, read in connection with the original deed of the easement for a right of way to the railroad company and the reservation therein of the fee of this right of way to the Beeks, the deed to Studebaker reserved also the fee of the right of way to the Beeks.

The case of *Hall v. Wabash R. Co.*, 133 Iowa 714, 110 N. W. 1089, presents a situation closely parallel to that before us. In that case a right of way had been previously deeded to the railroad company and later a deed had been made to another person of the entire tract, just as in this case the deed was made from the Beeks to Studebaker. In the deed of the entire tract, the following language was used: "Excepting the part occupied by the right of way of the Iowa Central Railroad Company." In the case here, there was a reservation and exception of the strip of land, and for a description, reference was made to the original deed of the right of way to the railroad company. The cases are thus clearly analogous. The court said:

"This exception is clear and unequivocal, and no title to the land embraced in the right of way passed. She deeded all of the forty-acre tract, except the land occupied by such right of way. We do not see how an exception could be more definite, or how the intent of the grantor could be made plainer. The railroad company then had a recorded deed of the right of way. An exception in the grant of the right of way alone would amount to nothing, and, unless the exception in question withheld from the grant the strip of land so occupied, it is meaningless. It was the soil itself that was in terms excepted from the grant, and not merely the right of way. The exception before us is not repugnant to the grant, and must be held valid; and, if it be valid, the

title to the land occupied as right of way remained in the grantor, with the like force and effect as if no grant had been made."

This language is directly applicable to the situation here. Since the railroad company was in possession of the right of way at the time the deed was given to Studebaker, under a prior recorded deed, the reservation and exception in the Studebaker deed would be meaningless, unless it was intended to reserve to the Beeks the title to the soil itself, and not merely to except the easement which had been granted to the railroad company. The language in the deed to Studebaker is even less capable of a contrary construction than was that in the deed in the *Hall* case. The *reservation* could only refer to the title to the soil of the strip in question, even if the exception were held to refer to the easement alone.

The case of *Reynolds v. Gaertner*, 117 Mich. 532, 76 N. W. 3, is also a close parallel to that in hand. In that case a deed excepted from the premises conveyed 2.46 acres which formerly had been conveyed to a railroad company for use as a right of way. The railroad company, as it seems subsequently, abandoned the right of way. The contest was between the grantor and grantee in the first mentioned deed, both claiming title to the strip formerly occupied by the railroad as a right of way. The court held that the exception in the deed was an exception of the fee of the right of way, not merely an exception of the railroad company's easement, and that the title to the land so excepted never passed to the grantee. Here, again, the language in the Studebaker deed, in that it both reserved and excepted the right of way, is less capable of the contrary meaning than that in the deed involved in the *Reynolds* case.

II. The claim that the second deed from the Beeks to the railroad company, conveying the 45.25 acres, conveyed to the railroad company the fee of the right of way reserved in their original deed of the easement to the railroad company might be conceded were it not for the fact that it was given

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upon an express condition which was never performed. The evidence fails to show that the railroad company ever constructed or maintained a depot on this 45 acres. Construing the deed from the railroad company of this 45.25-acre tract back to the Beeks, instrument (c), in the light of that circumstance, it seems clear that there was no basis for a reservation by the railroad company of the fee of this right of way. The railroad company never having performed the condition upon which alone its right to any part of the fee of this 45-acre tract could rest, the deed from the railroad company to the Beeks, instrument (c), must be construed as intended to reinvest the Beeks with all they had conveyed to the railroad company in their second deed, and as reserving only what the railroad company had received in its original deed of the right of way, instrument (a), which was nothing more than an easement for the use of the right of way for railroad purposes, the fee being retained by the Beeks. It follows, therefore, that the deed from the railroad company to O'Neill of the abandoned right of way, instrument (f), did not convey the fee of that strip, since the railroad company did not own the fee, and, by the abandonment of the right of way for railroad purposes, lost all right to the strip, in which it had nothing but an easement.

III. The claim that the identity of the reserving clause in the deed from the railroad company to the Beeks with that in the deed from the Beeks to Studebaker would compel the same construction on both deeds, thus carrying the fee of the right of way to Studebaker, would have much force were it not for the fact that the relation of the parties to the subject-matter in the two instances was different. As we have pointed out, the railroad company never had any claim to the fee of the strip of land here in question, except upon a condition which it never performed. Its deed to the Beeks was obviously for the purpose of reinvesting them with the title to the 45-acre tract because of its failure to perform

the condition. On the other hand, the Beeks at all times had the equitable right to the fee of this strip because of the non-performance of the condition. As said in *Delano v. Luedinghaus, supra*:

"In each case the equities of all the parties must be considered in arriving at the intent of the deed."

There was no equity to sustain a reservation in the railroad company of the fee of this strip. Studebaker and the Pyle heirs, however, having accepted in 1879 from the Beeks, who had the equitable and, as we construe it, the legal title in the fee of this strip, a deed reserving it to the Beeks, in full satisfaction of the bond for a deed of the donation claim, can, at this late day, hardly assert an equitable claim to this strip.

Viewed in the light of all of the circumstances, and of the relation of the parties to the subject-matter, we believe that the trial court reached the correct result.

The judgment is affirmed.

Crow, C. J., Gose, and Main, JJ., concur.

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[No. 11940. Department One. January 7, 1915.]

LOUIS T. SILVAIN, *as Receiver etc., Appellant*, v.
W. D. BENSON *et al., Respondents*.¹

APPEAL—RECORD—ABSTRACT—NECESSITY. Where no copy of the abstract was served upon two of the respondents, separately appearing, the appeal will be dismissed as to them.

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal that the court had acquired jurisdiction, becomes the law of the case and is conclusive on a subsequent appeal.

CORPORATIONS—STOCK SUBSCRIPTIONS—ASSESSMENT—DETERMINATION—RES JUDICATA. Where the validity of claims against an insolvent bank is determined in the matter of the receivership, upon notice to stockholders in proceedings to assess their stock, without any appeal taken, it cannot be litigated in a subsequent action against the stockholders.

SAME—ASSESSMENT OF STOCK—ACTIONS—DEFENSES. In an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank to which no certificate had been issued because all of its stock had not been subscribed, it is no defense that the subscriptions were invalid or that the organization had not been completed.

SAME. Such a defense could not be made where the court had regularly determined the amount of the debts and subscriptions and authorized an assessment and no appeal therefrom had been taken.

SAME—STOCK SUBSCRIPTION—ACTIONS—DEFENSES—ESTOPPEL. In an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank, it is no defense in favor of certain stockholders that they signed the subscription list without specifying the amount for which they subscribed, and that the amounts were thereafter written in without authority by the promoter; as they are estopped.

SAME—VALIDITY OF SIGNATURE. It is good defense to an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank that the subscription list was not signed by the defendant, or by any one authorized to sign for him.

APPEAL—REVIEW—ABSTRACTS OF RECORD. Where the abstract of the evidence contains no evidence of a fact in question, the court will not search the statement of facts for testimony therein to which no reference is made in the abstract.

¹Reported in 145 Pac. 175.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 14, 1913, upon granting a nonsuit except as to one defendant, dismissing an action by a receiver to enforce subscriptions to the stock of a corporation, tried to the court. Affirmed in part and reversed in part.

Shorett, McLaren & Shorett, for appellant.

Byers & Byers, for respondents Hull *et al.*

John W. Roberts, for respondent Pederson.

Alfred Gfeller, for respondent Jobst.

John E. Humphries, E. P. Edsen, Geo. B. Cole, Beeler & Sullivan, and *Peterson & MacBride*, for respondents Humphries *et al.*

Ernest B. Herald, Channing M. Coleman, McClure & McClure, Nicholas Schmitt, Edward Von Tobel, Emil J. Brandt, and *Edward C. Kriete*, for respondents Herald *et al.*

MAIN, J.—This action was brought by the receiver of the German-American Bank of Seattle against the defendants as subscribers to the capital stock of the bank. The cause was tried to the court sitting without a jury, and resulted in a judgment for the defendants, except as to the defendant Heinzerling, against whom a judgment was entered in favor of the plaintiff. From this judgment, the plaintiff appeals.

The facts, so far as necessary here to set them forth, are substantially as follows: On or about February 19, 1909, articles of incorporation were acknowledged and copies filed in the office of the secretary of state, in the office of the county auditor of King county, and with the state bank examiner. The annual license fee was paid for the year ending June 30, 1909. On April 15, a meeting of the stockholders was held at the Butler Hotel Annex, in Seattle, Washington. At this meeting there were present, either in person or by proxy, twenty-seven of the persons who had subscribed for the stock.

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At this meeting, by-laws were adopted and trustees elected for the ensuing year.

Immediately after the adjournment of the stockholders' meeting there was a meeting of the trustees. At this meeting, officers were elected. The first vice president and cashier were authorized to sign the lease with the Trustee Company for the banking room. The cashier was authorized to proceed to collect the subscriptions to the stock of the bank. Prior to this date, the fixtures, vault, safe, and some other articles necessary to a banking institution had been purchased and were in place. The banking room had been arranged for and a deposit made on the rental.

After the meetings of April 15, certificates of stock were issued to many of the subscribers for stock. This was paid for either by money or note, and in some instances by both. The capital stock of the bank was to be \$100,000, divided into 1,000 shares of the par value of \$100 per share. This stock was at no time all subscribed for. Sometime after the meeting of April 15, it became apparent that a full subscription to the capital stock could not be obtained, and it was concluded that the enterprise should be abandoned, or turned over to one Garland, who was willing to undertake its promotion. The certificates of stock which had been issued were returned to the corporate officers, and the money or notes which had been paid therefor were returned to the respective subscribers.

The debts contracted on account of the installation of the fixtures, vault, safe, etc., had been incurred prior to the meeting of the stockholders mentioned. Subsequently one of the creditors brought an action against the corporation and obtained a judgment for the amount of its claim. In this action a receiver was appointed for the bank. In due time the receiver, under direction of the court, converted the available assets into cash. This amounted to \$1,037.50 and, not being sufficient to meet the claims, the receiver made an application to the superior court for a call upon the stockhold-

ers for their unpaid subscriptions. The court fixed a date and directed that the receiver give notice to the stockholders, both by mail and by publication, of the time and place where a hearing would be held, for the purpose of determining the amount of the liabilities of the corporation, and the amount necessary to assess the solvent stockholders for the purpose of liquidating the same. Notice having been given as required by the order of the court, in due time the cause came on for hearing. At the conclusion of the hearing, the court entered an order wherein it was found "that there are unpaid claims against said German-American Bank of Seattle amounting to the sum of at least \$5,000," and that it would be necessary, in order to meet the existing obligations, that a call be made upon each of the subscribers to the capital stock. The stockholders not responding to this call, the present action was instituted against them. Other facts will be noted in connection with the consideration of the points to which they may be particularly germane.

There are approximately sixty respondents in the action. In addition to the appellant's opening and reply briefs, six briefs have been filed by different groups of the respondents. A discussion of all the questions raised in these briefs would extend this opinion to forbidden lengths. Only those questions will be considered which seem to us determinative of the controversy.

The respondents Hull and Klyce open their brief with a motion to dismiss the appeal as to them for the reason that no copy of the abstract was served upon them. This motion must be granted. *Ollar-Robinson Co. v. O'Neill*, 80 Wash. 1, 141 Pac. 194. The plaintiff, in his reply brief, states that there was a stipulation that the one copy of the abstract served upon the attorneys for certain of the respondents should be sufficient. This stipulation, however, does not appear in the record. Had the stipulation been made a part of the record, or had the attorneys for the various respondents acknowledged on the back of the appellant's abstract the re-

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ceipt of a copy thereof, there would be no occasion for the motion. But under the record as it is, there is no alternative but to dismiss the action as to these two respondents.

Upon the merits, it is first claimed that in the receivership proceeding the court did not acquire jurisdiction of the defendant corporation, and that, therefore, the entire proceeding is ineffectual. This question was before this court upon a former appeal in this case. *Silvain v. Benson*, 68 Wash. 286, 123 Pac. 457. It was there held that, upon the showing made, the court had acquired jurisdiction, and the cause was "remanded for trial upon the merits." The question having been presented and determined upon the former appeal, the ruling there becomes the law of the case upon that question and will not be again reviewed.

It is next claimed that the debts were not those of the German-American bank, but were the individual debts of one Heinzerling. It is asserted in one of the briefs that this was the view of the trial court. But that question is one which is not subject to be litigated in the present proceeding. As appears from the facts, the court fixed a day upon which the amount of the liabilities of the corporation would be determined, as well as the assessment necessary to meet these against the stockholders. Of this hearing, notice was given by mail and by publication. At the hearing, the amount of the claims against the corporation was determined, and it was ordered "that the call and assessment be and is hereby made against each and all of the subscribers of stock of the said German-American Bank of Seattle. . . ." It does not appear that that order was appealed from by any of the parties. The court there found that the claims were obligations of the corporation. The rule is that, where the validity of the claims against the corporation is determined in a receivership proceeding, it cannot be litigated when a subsequent action is brought against the individual stockholders. If these claims were in fact not the obligations of the corporation, that question should have been reviewed by an ap-

peal from the order of the court adjudging them to be such. *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536; *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

Speaking upon this question in the case last cited, it was said:

"Two main questions were put in issue by the proceedings, and finally determined by the court, viz., (1) the right of the creditors represented by the receiver to have an assessment, that is, whether any assessment could be properly levied at that time; and (2) the amount of the assessment. Testimony was heard, and the stockholders availed themselves of an opportunity to cross-examine witnesses upon the subject of the amount of the assessment, and the court finally decreed the amount of the bank debts of a strictly banking character then existing. Upon that point the decree must be considered final, at least as to all parties regularly before the court and contesting that question. If the court had power to finally determine the exact amount of the assessment, certainly it ought to have had power to determine the receiver's right to any assessment at all, for it would be idle to determine the amount, if the right did not exist.

"That the decree is one from which an appeal will lie becomes more apparent when viewed from the aspect of an adverse decision. Suppose, for instance, it had appeared on the face of the petition that the last of the assets had been exhausted and applied more than six years before the petition for the assessment was filed; doubtless the court would have sustained the demurrers on the ground that the right to prosecute this remedy had accrued more than six years ago; but that is exactly what the appellants are contending now appears from the face of the petition. Suppose, farther, that the demurrers had been sustained, and the proceeding dismissed, on the ground that an assessment could not be properly levied at this time by reason of lapse of time; no one would doubt the receiver's right to appeal as from a final order; and, if a decree will give one party a right to appeal, when adverse to him, it must confer the same right on the other under a like condition. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Taylor v. Spokane Falls etc. R. Co.*, 32 Wash. 450, 73 Pac. 499. On the whole, therefore, we think

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that an appeal lies from the decree in the case before us, and that the cause is here for determination upon its merits."

Another contention is that, since the total amount of capital stock had at no time been subscribed for, and since the state bank examiner had not issued a certificate to the bank authorizing it to do a banking business, there can be no liability so far as the subscribers to the capital stock may be concerned. It must be remembered that this action is by the receiver as the representative of the creditors, and is not an action by the corporation seeking to collect unpaid subscriptions. Where the action is brought by the receiver, the defenses of no valid subscription to the capital stock of the company, or defects of organization, are not available. In *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, two of the contentions were that valid subscriptions to the capital stock had not been made, and that there was a defect in the organization of the company. Speaking upon these contentions, together with others, in that case, it was said:

"The first five of these defenses may be considered together. It must be remembered that this is not an action by the corporation to enforce collection of subscriptions for stock or its contracts with its subscribers, but is an action brought by a receiver, under order of the court, to enforce such subscriptions for the benefit of creditors. As between the corporation itself and the stockholders all these defenses would probably be good, but as between the stockholders and the creditors of the corporation another rule prevails. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415. In such cases,

"It is no defense to a suit by a creditor to recover his debt out of an unpaid subscription, that the defendant was induced to subscribe to the stock by fraudulent misrepresentations of the agent of the corporation, or by an agreement which the corporation had failed to carry out, or that the corporation was irregularly organized or organized for an illegal purpose, or has been dissolved; nor can a stockholder set up informalities in the issue of the stock if the corporation had the power to create it, though he may show that the stock

is void as having been issued in excess of the limit imposed by the charter.' 26 Am. & Eng. Ency. Law (2d ed.), p. 1011. See also 10 Cyc., pp. 244 and 249; *Mitchell v. Mathe-son*, 23 Wash. 723, 63 Pac. 564; *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858.

"Under this rule the trial court was clearly in error in basing the judgment of dismissal upon the facts found as stated above. Such facts if true did not constitute a defense in this action, because the stockholders were estopped to say that the corporation was not a legal one, or that they had a contract with the corporation to purchase its stock at fifty per cent of its par value, or that they subscribed for its stock believing that the company was not in debt. The receiver in this action represents the creditors. *Mitchell v. Mathe-son*, *supra*."

As to the defect claimed, in that the state bank examiner had at no time issued a certificate authorizing the corporation to do a banking business, it may also be said, as stated above, that the claims were found by the superior court in the receivership proceeding to be obligations of the corporation, and that no appeal was prosecuted from that judgment.

As to some of the respondents, it is claimed that they placed their names upon the subscription list but did not indicate in figures thereafter the amount of the subscription or the number of shares, and that therefore there can be no liability as against them. The number of shares set opposite their respective names, it is claimed, were placed there without authority. When they signed their names to the subscription list it must have been as an incentive to others to subscribe. In other words, to permit the promoter to represent them as subscribers when in fact they were not. In *Jewell v. Rock River Paper Co.*, 101 Ill. 57, the court considered the question as to whether a person who places his name upon a subscription contract for the purpose of inducing others to subscribe, but does not carry out the amount of the subscription in figures, can be held upon such subscription contract. Answering the contention that there was no liability upon such subscription, it was there said:

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"We frankly confess our inability to perceive the force or plausibility of this theory, however prominent or influential the parties may be. The more natural theory is, that if the amounts of their subscriptions were not carried out at the time, and were purposely left blank, the object in doing so was to enable Willard to represent them as subscribers when they were not, which would have been a palpable fraud on those subscribing through such an influence. It is well known that in becoming a party to an enterprise of that kind one is generally controlled in a large degree, by the character of those who are, or who are expected to be, identified with it. Any artifice or trick, therefore, tending to mislead a subscriber in this respect would be highly reprehensible in morals, as well as a legal fraud. If, then, appellants signed the subscription book of the company in blank for such purpose, it is but fair and just to hold that as to creditors of the company they thereby impliedly authorized those empowered to take subscriptions to fill up the blanks, and that having been done in this case, as is claimed, appellants are estopped from questioning their authority to do so."

To the same effect, see, also, *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755. It is argued that certain of the subscriptions were conditional, and that, inasmuch as the conditions were never fulfilled, no liability arose by reason of such subscription. It may be assumed, but not decided, that the rule is that a conditional subscriber is not liable even when the rights of creditors are involved, unless the condition upon which a subscription was based has been fulfilled, or unless the condition is waived or the subscriber is estopped from asserting the condition. In this case, the subscription contract was introduced in evidence. Upon its face it does not appear to be conditional. The appellant prepared an abstract of the record. The respondents prepared a supplemental abstract. In neither of these abstracts is there evidence set forth or referred to which shows a conditional subscription. It may be that the statement of facts shows such evidence, but if it does, we fail to find that it has been abstracted. We have not overlooked the fact that in the respondents' supple-

mental abstract it is said the promoter, Heinzerling, testified that the subscriptions should not become effective until the entire amount of the capital stock was subscribed. In support of this statement, certain pages of the statement of facts are referred to. But upon an examination of the statement of facts at the pages referred to, we are unable to find testimony supporting the statement as abstracted.

One of the respondents, Fred H. Peterson, is not obligated by the subscription contract introduced in evidence. His testimony, as abstracted, is unequivocal and positive that he neither signed the subscription list, which was plaintiff's "Exhibit E," nor authorized any one to sign his name thereto. By reference to the statement of facts, the abstract in this regard is verified. This appellant, having neither signed nor authorized the placing of his name upon the subscription contract introduced in evidence, is not liable.

Finally, it is claimed that, when certain of the subscriptions were taken, fraudulent representations were made by the person securing the subscriptions. But we do not find in the abstracts evidence sustaining this charge. It is true that the certificates which had been issued were surrendered. But the reason for the surrender does not appear to have been because the subscriptions were induced by fraud, but because the full amount of the capital stock had not been subscribed, and if the subscriptions could not be secured the enterprise must fail.

It may be that in the statement of facts there is testimony which would show certain of the subscriptions to be conditional, and others fraudulent, which had been rescinded for that reason before the rights of creditors intervened. The court, however, will not search the statement of facts for testimony to which no reference is made in the abstracts.

From what has been said, our conclusion is that the judgment as to Hull, Klyce and Fred H. Peterson will be affirmed. The judgment as to all the other respondents will be reversed. The judgment rendered against Heinzerling is not involved

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in this proceeding, he not having appealed. Klyce, Hull, and Peterson will recover their costs in this court against the receiver. The receiver is entitled to costs as against those respondents as to whom the judgment is reversed. The cause will be remanded with directions to the superior court to take further testimony for the purpose of determining the proportionate amount for which judgment shall be rendered against each solvent stockholder, in order that the debts of the corporation and the expenses of the receivership and litigation may be paid.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

[No. 12023. Department One. January 7, 1915.]

In re PINE STREET ASSESSMENT, MINNIE CUNNINGHAM, *et al.*,
Appellants.

THE CITY OF WALLA WALLA, *Plaintiff* v. JOSEPH DAVIN *et al.*,
*Defendants.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—NOTICE—CONSTITUTIONAL LAW—DUE PROCESS. Under Rem. & Bal. Code, §§ 7772 and 7792, making eminent domain proceedings to condemn property for a local improvement and the proceedings to assess the benefits therefrom two entirely separate proceedings so far as acquiring jurisdiction and the questions involved are concerned, owners in the district assessed for benefits, but whose lands are not taken, are not deprived of property without due process of law in that they were not served with notice of the condemnation proceedings or given an opportunity to be heard therein; notwithstanding that the jury in such a proceeding is authorized to find the damages to the defendants for land taken and to the balance of their lands not taken after offsetting the benefits, thereby precluding the assessment of such lands not taken.

SAME—IMPROVEMENTS—ASSESSMENT OF BENEFITS—EXEMPTIONS—PROCEEDINGS. An award of damages in eminent domain proceedings to take land for street purposes, after fixing the amount for the land taken, reciting "For damages to remaining land by reason of

¹Reported in 145 Pac. 179.

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severance, \$150," must, in the light of instructions directing the jury to offset the benefits against such damages, be construed as a net damage over and above special benefits, exempting the land from assessment, as authorized by Rem. & Bal. Code, § 7782.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered January 31, 1914, confirming an assessment roll, upon appeal from the eminent domain commissioners. Affirmed.

John C. Hurspool and E. W. Benson, for appellants.

John F. Watson (Thomas H. Brents, of counsel), for respondent.

PARKER, J.—This is an appeal from a judgment of the superior court of Walla Walla county, confirming a special assessment made by eminent domain commissioners upon property of appellants to pay the expense of acquiring land for the extension of Pine Street, in the city of Walla Walla, by eminent domain proceedings. The land so acquired by the city was a portion of a tract owned by Joseph Davin *et al.* The jury awarded them, as the value of the portion of their tract taken, the sum of \$1,500; and as damages to the remainder of their tract by reason of the severance, the sum of \$150.

Joseph Davin *et al.*, the owners of the land so taken and damaged, were alone made defendants in the condemnation branch of the proceedings, and thereafter appellants and other owners of property, found by the eminent domain commissioners to be benefited by the extension of Pine Street, were made parties to the assessment branch of the proceedings, given notice and awarded a hearing upon the confirmation of the assessment. Both branches of the proceedings were conducted, as to parties and notice, as prescribed by the statute relating to the exercise of the power of eminent domain by cities, Rem. & Bal. Code, § 7767, and following.

Counsel for appellants contend that the assessments against their property are void for want of due process of

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law, in that they were not made parties to the condemnation branch of the proceedings and were thereby deprived of a hearing upon the question of the amount of the award made by the jury for the land taken and damaged. They claim the right to such a hearing upon the ground that their property is being assessed to pay the award; that the amounts they are called upon to pay are not only affected by the amount of the award made by the jury, but also by the finding of the jury that the remaining land of Davin *et al.* was damaged, resulting in its exemption from assessment which it otherwise would not have been, but would have shared, with appellants' land, the burden of the assessments. It is not claimed that there was any want of jurisdiction in the condemnation proceedings impairing in the least either the right of the city or the defendants Davin *et al.*, the owners of the land taken and damaged. Neither is it claimed that the condemnation proceedings were conducted by the city authorities other than in good faith, with due effort to procure an award by the jury as favorable as possible to the owners of property to be assessed to pay the same.

We have no such situation here presented as in *In re Third, Fourth, and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, where the award was made by the jury in compliance with an agreement between the city and the owners of the land taken and damaged, rendering the award and the judgment thereon void as to the owners of property to be assessed to pay the award. It seems to us the claimed right of appellants to be heard as parties to the condemnation branch of the proceedings must rest upon some positive statute law before it can be recognized by the courts; though this does not mean that the owners of assessed property may not challenge the validity of the award and judgment thereon upon jurisdictional grounds, or upon grounds of connivance or bad faith on the part of the city authorities amounting to fraud as against the right of owners of property to be assessed, when it comes to fastening assessment

liens upon their property. This claimed right to be heard in the condemnation branch of the proceedings is, as we view it, in substance the same as the right of property owners to protest against the making of the improvement in the first instance; or the right to have the cost of the improvement determined by competitive bids; or the right to have the improvement initiated in some prescribed statutory manner. The securing of such rights as these, as they are sometimes secured by statute, is unnecessary to satisfy the due process of law provisions of the state and Federal constitutions. This view finds support in the case of *In re Leary Avenue*, 72 Wash. 617, 131 Pac. 225, where it is said:

“While property owners whose property is liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against making the improvement, they have no absolute right to have their protest granted, or absolute right to maintain an action or proceeding in the courts based on the right if their protest is not granted. Rights of this character must be based upon some positive law or statute especially conferring the right, as it does not exist as part of the inherent law of the land. That there is no such law or statute is conceded; hence, it must follow, we think, that no vested right is denied by the failure to give property holders whose property is liable to be assessed to pay the cost of a contemplated improvement an opportunity to protest against such improvement. Nor does a property holder whose property is liable to be assessed for a public improvement have a legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken and damaged by the making of the improvement. The duty of conducting these proceedings is devolved by statute upon the city, and since it has the responsibility of properly conducting the proceedings, it must follow that it, and it alone, has the lawful right to appear in such proceedings, or to be represented therein by counsel.

“Nor do we perceive any valid reason which supports the contention. The city must, of course, initiate and carry on a public improvement in the manner prescribed by the laws governing the procedure and it is an admittedly essential

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element of a valid assessment that the owners of property on which an assessment is proposed to be levied have notice of the assessment and an opportunity to be heard as to its validity and amount before it becomes a fixed charge upon their lands. But these mark the extent of their absolute rights. . . ."

The eminent domain branch and the assessment branch of the proceedings are entirely separate, so far as acquiring jurisdiction over the parties and the questions to be adjudicated are concerned. Rem. & Bal. Code, §§ 7772, 7792 (P. C. 171 §§ 39, 79); *In re Third, Fourth and Fifth Avenues, supra*; *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 698, 132 Pac. 633; *Commissioners Commercial Waterway Dist. No. 2 v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042. No decision has come to our notice indicating that there is any want of due process of law by failure to award to a property owner, whose property is to be assessed for a public improvement, a hearing upon the taking of any preliminary steps by which the cost of the improvement is determined, whether such cost is incurred by eminent domain proceedings or otherwise.

The language of the verdict of the jury awarding damage to the remaining land of Davin *et al.* is simply "For damage to remaining land by reason of severance, \$150." Counsel for appellants insist that this finding of the jury did not result in the exemption of this land from assessment to aid in paying the cost of extending the street, and that it therefore should have been assessed so as to have borne its proportion of the burden with the lands of appellants and others which were assessed, the same as if it were not remaining land from which that taken was severed.

The rule for awarding damages to land not taken and the exemption of such land from assessment, is prescribed by Rem. & Bal. Code, § 7782 (P. C. 171 § 59), as follows:

"When the ordinance providing for any such improvement provides that compensation therefor shall be paid in whole or in part by special assessment upon property benefited, the

jury or court, as the case may be, shall find separately: 1.
. . . 2. The damages which will accrue to the part remaining because of its severance from the part taken, over and above any local or special benefits arising from the proposed improvement. No lot, block, tract or parcel of land found by the court or jury to be so damaged shall be assessed for any benefits arising from such taking;”

The trial court clearly instructed the jury accordingly. Counsel's contention seems to be that the verdict should have, upon its face, evidenced the fact that the jury offset the benefits against damages in arriving at this portion of the award. We are of the opinion, however, that, in view of the law and the court's plain instructions to the jury, the verdict must be read in the light thereof, which we think renders its meaning quite plain that the jury's finding as to this land is a finding of net damage over and above special benefits. This statutory provision exempting land, found so damaged, from assessment, has been given full force and effect by our previous decisions. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *Seattle & P. S. Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093; *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *Inner-Circle Property Co. v. Seattle*, 69 Wash. 509, 125 Pac. 970; *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089.

In the last cited case we said:

“It is apparent that this provision of the law is for the purpose of enabling the eminent domain commissioners and the court, in making assessment against benefited property, to determine what property is exempt from such assessment by reason of being damaged by the taking, and thus avoid the constitutional objection against assessing property which is damaged, for the very purpose of paying such damage.”

Other contentions of counsel for appellant have to do with the questions of benefits and apportionment thereof. A careful review of the evidence to which our attention has been called convinces us that we would not be warranted in disturbing the conclusion reached by the eminent domain com-

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missioners and the trial court. The evidence is by no means in harmony as to the amount of benefits or the proper apportioning thereof. It furnishes ample room for difference of opinion upon both of these questions. We are quite clear that it cannot be said that the decision of the eminent domain commissioners or the superior court was capricious, or arbitrary, or rested upon a fundamentally wrong basis. *In re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58.

The judgment is affirmed.

Crow, C. J., Gose, Morris, and Chadwick, JJ., concur.

[No. 12094. Department One. January 7, 1915.]

WALTER M. TOLBERT, *Appellant*, v. MODERN WOODMEN OF AMERICA, *Respondent*.¹

BENEFICIAL ASSOCIATIONS — FOREIGN CORPORATIONS — JURISDICTION OF COURTS—CANCELLATION OF CERTIFICATE. The courts of this state have no jurisdiction to interfere with the internal affairs of a foreign beneficial association, by enjoining the officers of the society, at its headquarters in the state where it exists as a corporation, from taking action in the threatened cancellation of the certificate of a member of the society in this state, notwithstanding the society has an authorized agent in this state upon whom service of process can be made, under 3 Rem. & Bal. Code, § 6059-222.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 27, 1914, dismissing an action to enjoin the cancellation of a benefit certificate, after a trial to the court. Affirmed.

Elias A. Wright, for appellant.

Benj. D. Smith and *Ralph Simon*, for respondent.

PARKER, J.—The plaintiff, Walter M. Tolbert, commenced this action in the superior court for King county, seeking an injunction to prevent the defendant, Modern Woodmen of America, from canceling his benefit certificate which evidences

¹Reported in 145 Pac. 183.

his membership and insurance in the defendant society. The plaintiff has appealed from the judgment of the superior court denying the relief prayed for.

Respondent is an incorporated fraternal beneficiary society, organized and existing under the laws of the state of Illinois, with its principal place of business at the city of Rock Island, in that state. It has local branches called camps in the several states of the Union, one of which is at Seattle, in this state. In May, 1910, appellant made application for, and was admitted to, membership in the Seattle camp, when a benefit certificate was issued to him by the proper officers of the society at Rock Island, evidencing his membership in the society and the right of his beneficiary named in the certificate to participate in the benefit fund of the society to the amount of one thousand dollars in case of his death while a member in good standing. On March 21, 1913, the head clerk of the society at Rock Island, evidently acting at the instance of the executive council of the society, gave notice in writing to appellant as follows:

“Modern Woodmen of America.

“A Fraternal Beneficiary Society.

“Rock Island, Ills., Mar. 21, 1913.

“Mr. Walter M. Tolbert,

“Box 16, R. D. No. 2,

“Seattle, Washington.

“Esteemed Neighbor: Complaint has been filed at this office to the effect that at the time of the Head Physician's approval of your application for beneficial membership in this society, you were past 45 years of age. You are, therefore, notified that the Executive Council of this society will be in session in its council chamber in the head office building of the society, at Rock Island, Ill., on the 17th day of April, 1913, at 10 o'clock a. m., on or as early thereafter as possible, at which time and place you may appear, in person or otherwise, to show cause why your benefit certificate should not be declared to be absolutely null and void, and to have been so at all times, on account of your having been past 45 years

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old at the time of the head physician's approval of your application for beneficial membership in this society.

"Fraternally yours,

"C. W. Hawes, Head Clerk, M. W. of A."

This notice was received by appellant at Seattle in due course of mail a few days later. Evidently deeming this a threat by respondent to cancel his benefit certificate, appellant, on March 31, 1913, several days before the time appointed for the hearing before the council, as stated in the notice, commenced this action in the superior court for King county, seeking to enjoin the cancellation of his benefit certificate. It is to be noticed that the injunctive relief sought is against alleged threatened action of officers of the society at its headquarters, in the state of Illinois, under whose laws it exists as a corporation.

We are constrained to hold that the denial of relief and judgment of dismissal rendered in the superior court must be affirmed if for no other reason than that of want of jurisdiction in the courts of this state to interfere with the internal affairs of a foreign corporation; since the alleged threatened act sought to be restrained would be but the exercise of claimed authority of the officers of the society at its home office, beyond the territorial jurisdiction of the courts of this state. In *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039, there was involved the threatened forfeiture of the rights of a stockholder in a corporation existing under the laws of the state of North Carolina, hence foreign to the territorial jurisdiction of the courts of Maryland. Disposing of the contention there made that the stockholder was entitled to mandamus against the corporate authorities to reinstate him in his rights as a stockholder, and refusing to assume jurisdiction, the court observed:

"It may not be in all cases easy to draw a clear line of distinction between the acts of a corporation relating to its internal management, and those which do not. But we apprehend the distinction to be this: That where the act com-

plained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our courts will not take jurisdiction, where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here.

"The controversy in the case before us arises entirely out of the internal management of the affairs of the company. It is the complaint of a *stockholder*, that he has been deprived of his rights, as a *stockholder*, by the illegal action of the board of directors. His complaint is, that he is still a stockholder, and a member of the corporation, and entitled to his vote at the stockholders' meeting, &c., but that these rights have been withheld from him by the action of the directors, and he seeks to be reinstated as a member of a foreign corporation by the action of a Maryland court. He seeks this through the extraordinary remedy of a *mandamus*, to compel the board of directors to place on their books his name as a stockholder, and thus to restore him to all the rights of a member of the corporation, which the directors say he had forfeited."

In *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185, there was involved a threatened deprivation of the rights of a member of the Union, a fraternal insurance association, by its officers at its home office, it being a foreign corporation beyond the territorial jurisdiction of the courts of Texas. The court disposed of the claimed right of the insured to an injunction against the home officers of the Union to prevent cancellation of his policy as follows:

"Putting that construction upon his petition most favorable to the appellee, his allegations amount to this: That the appellant is a foreign corporation, with its domicile in the state of Missouri, and is engaged in the business of issuing policies of insurance against sickness, accident and death; that it is doing business in this state under and by virtue of

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a permit from the proper officer; that the appellee is the holder of one of the appellant's policies of insurance, without naming the benefits agreed to be paid; that he has promptly paid in full, as they accrued, all of the dues and assessments required of him by the terms of his policy, and is, therefore, entitled to be regarded as a policy holder in good standing; that notwithstanding those facts, the appellant is wrongfully threatening to cancel and declare forfeited the policy issued to the appellee; that unless the appellant is restrained from so doing it will cancel and declare forfeited the aforesaid policy of insurance; that the appellee is now over 60 years of age, and if his policy of insurance is forfeited he will be without protection, inasmuch as he will be unable, by reason of his age, to obtain any further insurance. It thus appears, from the allegations of the appellee that he is asking a court of equity in this state to enjoin the officers and agents of a foreign corporation, domiciled in another state, from doing certain acts in and about their business affairs in that state. The court below having granted the relief prayed for, let us suppose that this court should affirm that judgment. The question would then arise: how is such a decree to be enforced in the event the officers and agents of the appellant company should persist in doing the acts prohibited? Such a judgment could only operate *in personam*, and obedience to the court's mandate can be compelled only by an attachment of the body of the contumacious individuals and the infliction of some punishment. In the case before us all of the parties against whom the order of the court is directed are permanently domiciled beyond the territorial jurisdiction of the court, and cannot be reached by any process issued therefrom. It is therefore evident that such a decree would be utterly futile. Moreover, the appellant being a foreign corporation, domiciled in another state, it is not within the judicial province of a court of this state to undertake to supervise and direct its internal affairs and management. *Clark v. Mutual Reserve Fund Ass'n*, [14 App. D. C. 154], 43 L. R. A. 392; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, 834 [84 N. W. 457]; 3 Cooley's Briefs on Ins., p. 2841. It is true that there are instances in which a court of equity situated in one state will enjoin the performance of acts beyond its territorial jurisdiction, but this seems to be limited to cases where the parties against

whom the injunction is sought reside within the jurisdiction of the court. *Bel lows, etc., v. Rutland*, 28 Vt. 470; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179; *Cole v. Cunningham*, 133 U. S. 107; 1 High on Inj., §§ 105, 106."

In *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621, 625, where the insured sought to have his claimed rights protected by injunction against officers of the company at its home office, which was foreign to the territorial jurisdiction of the courts of Virginia, the court observed:

"Process was served upon the agent of the association as provided by statute. The association appeared by counsel, and demurred to the bill. Its demurrer was sustained, and the bill dismissed. From that decree this appeal was allowed.

"Several grounds of demurrer are relied on, but the principal objection urged to the bill is that the case made and the relief sought would require the court to interfere with the internal management of a foreign corporation, a subject-matter over which the court has no jurisdiction. If this objection is well founded it is decisive of the case, and will render it unnecessary for us to consider the other grounds of demurrer. It seems to be well settled that courts will not interfere with the management of the internal affairs of a foreign corporation. Such questions are to be settled by the tribunals of the state which created the corporation. The reasons for such a rule are apparent. Courts other than those of the state creating it, and in which it has its habitat, have no visitatorial powers over such corporation, have no authority to remove its officers, or to punish them for misconduct committed in the state which created it, nor to enforce a forfeiture of its charter. Neither have they the power to compel obedience to their orders nor to enforce their decrees. *Smith v. Mutual L. Ins. Co.*, 14 Allen 336; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Condon v. Mutual Reserve Fund Life Ass'n*, Court of Appeals of Maryland (January term 1899); [89 Md. 99], 44 L. R. A. 149; 6 Thompson, Corporations, Sec. 8011.

"There is nothing in the act of Assembly approved May 18, 1887, entitled 'An Act in Relation to Insurance Companies and Associations upon the assessment plan' (Acts)

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Extra Session 1887, Chapter 271, p. 348 &c., which changes the general rule upon the subject, and gives to the courts of this state the right to control or interfere with the management of the internal affairs of a foreign corporation doing business here. Section 3 of that act provides, among other things, that no insurance company or association organized upon the assessment plan shall transact business in this state by an agent, unless it shall first authorize some person who is a resident of this state 'to act as its attorney, and to acknowledge service of process, or upon whom process may be served for and on behalf thereof, which service shall be taken and held to be as valid upon such corporation or association according to the laws of this or any other state.'

"The object of that provision of the act was to secure the residents of this state the benefit and protection of its own laws, and to confer upon its own courts jurisdiction to determine and enforce their rights where the subject-matter of the litigation was within their jurisdiction, or the remedy sought was within their reach. It provides how the corporation can be brought into court, but it does not confer upon the courts, nor does it require such corporations to concede, any right to exercise authority over the organization, the corporate functions, nor the relations between the corporation and its members, nor to determine the rights and duties of the corporation or its members arising under the law of the state of its creation, and depending upon its local laws, nor deprive it of the right to plead a want of jurisdiction on the ground that the subject-matter of the suit, or the remedy sought, is beyond the reach of the court, or not within the sovereign power of the state from which the court derives its authority."

This is of value in showing that the fact that the statutes of a state make provisions for admitting of foreign life insurance associations to do business therein, and for appointment of an agent upon whom service of process may be made, do not enable the courts of the state to exercise extraterritorial jurisdiction to the extent of controlling the internal affairs of such association. Dealing with this phase of the question in the light of such a statute, the following observations of the court in *Condon v. Mutual Reserve Fund Life*

Ass'n, 89 Md. 99, 118, 42 Atl. 944, 73 Am. St. 169, 44 L. R. A. 149, 154, are of interest here:

"The reasons for thus interpreting these provisions of the Code are conspicuously clear. There are obvious difficulties that would be encountered if the courts of one state undertook to adjust the internal affairs of a foreign corporation formed under the laws of a different state, and having its *habitat* within the borders of another sovereignty. The absence of a visitorial power over such a corporation and the absolute inability to enforce a forfeiture of its charter for a violation of the law, or to remove its officers for misconduct, or to punish them for malversations committed in the place of its domicile, are open and apparent obstacles in the court's pathway, should it assume to exert an extraterritorial jurisdiction. Besides all this, its lack of the means to do full justice, and its want of the machinery to enforce against the corporation in the place of its existence, any decree it might render in such a proceeding indicate, if they do not demonstrate, that the legislature never designed to confer a power, the exercise of which would or might be utterly fruitless and vain."

Our statute relating to the appointment of a resident agent for, and service of process upon, foreign fraternal beneficiary societies plainly must be viewed in this same light. Laws of 1911, p. 288, § 222 (3 Rem. & Bal. Code, § 6059-222); *Clark v. Mutual Reserve Fund Life Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390; *Jackson v. Hopper*, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658; *Kinney v. Mexican Plantation Co.*, 233 Pa. 232, 82 Atl. 93. These authorities, we think, are conclusive of the correctness of the disposition of the cause by the superior court. Our attention is called to *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689. That case, however, involved the rights of a member in a fraternal benefit association organized under the laws of this state. The question of extraterritorial jurisdiction of the court did not stand in the way of the granting of such relief as was there held to be proper.

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We conclude that the relief asked for by appellant is beyond the power of the courts of this state to grant. We refrain from discussing other questions involved touching the merits of the controversy.

The judgment is affirmed.

CROW, C. J., and MORRIS, J., concur.

CHADWICK and GOSE, JJ., (concurring)—We concur in the result. This action was brought prematurely in any event. The demand made upon the defendant was a reasonable one and sustained by the authorities. He was not called upon to subject his cause to the jurisdiction of the court of a foreign state. He was asked to show cause to the company, "in person or otherwise, why his benefit certificate should not be declared void under the rules and by-laws of the society." Instead of meeting this very proper demand at the bar of the society, he has rushed into court demanding that it be determined as a matter of law that the company is about to do him an injury, when under his contract the society has a preliminary right to inquire into the facts and pass its judgment thereon. It will be time enough for plaintiff to seek relief at the hands of the courts when the society has injured or threatened to injure him.

[No. 12152. Department One. January 7, 1915.]

NORTHERN BANK & TRUST COMPANY, *Appellant*, v. W. P.
DAY *et al.*, *Respondents*.¹

CORPORATIONS—STOCK—STOCK DIVIDENDS—LEGALITY. Stock dividends, by increasing the capital stock of a corporation and issuing the increase to its stockholders, are lawful, where the same are in good faith and the company's assets exceed its debts and the amount of the capital stock, including the increase so distributed.

SAME—LEGALITY OF STOCK DIVIDENDS—EVIDENCE OF GOOD FAITH—SUFFICIENCY. Such stock dividends are not shown to be in bad faith, by reason of the failure of the company a year and a half later, where the company at the time was doing a good business, and was in good condition, there was need of increasing the capital stock, persons acquainted with its affairs and business invested in the stock, and there was nothing to indicate that the stockholders were not honest in the belief that the undivided profits exceeded the par value of that portion of the increase which was distributed as a stock dividend.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 12, 1913, in favor of the defendants, in an action to recover unpaid stock subscriptions. Affirmed.

Shorett, McLaren & Shorett, for appellant.

Ballinger, Battle, Hulbert & Shorts, Granger & Clarke, and *Lund & Lund* (*R. G. Denney*, of counsel), for respondents.

MORRIS, J.—The appellant, as trustee in bankruptcy, seeks in this action to recover from the respondents, as stockholders of an insolvent corporation, an amount claimed to be due the corporation upon subscriptions to its capital stock. The pertinent facts are about these: In March, 1910, the stockholders of the Standard Fish Company adopted a resolution increasing its capital stock from \$25,000 to \$60,000, the par value of both the old and new issues of stock being ten dol-

¹Reported in 145 Pac. 182.

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lars per share. At a subsequent meeting of the trustees, it was provided that fifteen hundred shares of the increased stock should be divided between the stockholders according to their holdings January 1, 1910, and that such increase of stock should be issued in lieu of dividends. Under this arrangement, certificates of capital stock were issued to the respondents, dividing the fifteen hundred shares between them in various amounts ranging from 21 to 463 shares. It is this \$15,000, representing the par value of this stock, that appellant seeks to recover, contending that respondents have not paid for the stock in money or property of any value.

We have held, following the uniform rule, that dividends can be declared and paid only out of profits or surplus net earnings, and that a corporation could not reduce its capital stock by paying any portion of it to its stockholders. *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637. This rule is to be read in the light of the facts there presented. If the circumstances here were of the same nature as those reviewed in the cited case and others upon which it is based, the same rule would necessarily be announced. But we have another rule that, where stockholders act honestly and in good faith in placing a value upon the assets of the corporation for the purpose of paying subscriptions to capital stock or in declaring dividends, no creditor can successfully complain of such act unless he can show fraud of some character. The court will look to the *bona fides* of such a transaction and, if it is clear that it was carried out in good faith in all its particulars, and in the exercise of a judgment fairly and honestly directed, it will be sustained. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Taylor v. Cummings*, 127 Fed. 108; *Taylor v. Walker*, 117 Fed. 737.

A like pronouncement has been made by us in *Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, in holding that, if the assets of a corporation exceed its debts and the amount of the capital stock, the excess can be applied by the stockholders in pay-

ment of subscriptions to an increase of capital stock. It is not an infrequent thing for a corporation to make a stock dividend by increasing its capital stock and issuing the same to its stockholders, and so long as the corporation is possessed of property exceeding its liabilities in an amount equal to its capital stock, including such increase, it will be permitted to do so. *Lantz v. Moeller, supra*; 2 Clarke & Marshall, Private Corporations, p. 1603; 1 Cook, Corporations, § 287.

The purpose of the stockholders in increasing the capital stock was plainly to enable the company to provide cold storage facilities. The books of the company, as represented to the stockholders by the treasurer, showed the company to be in good financial condition, with undivided profits exceeding the par value of the 15,000 shares of stock. We can find nothing to indicate that the respondents were not honest in such a belief at the time, or that it appeared other than in good faith to them and as proper in a business sense to divide this profit among themselves before taking in additional stockholders.

Illustrating the good faith of the transaction is testimony to the effect that, subsequent to the issuance of the new stock, the company refused to sell stock to certain offering parties, giving as their reasons therefor that the company was a small one and only those who were familiar with the fish business and could be of some assistance to the company were wanted in the company. Another fact that looms large in showing good faith is that the captain of the fishing boat, referred to as the Woodbury, invested \$1,000 in this stock. This fact is significant in view of the attack made upon the value of the Woodbury and the act of the company in increasing its value from \$15,000 to \$20,000. This man knew the boat and its condition. It does not look reasonable that he would have paid \$1,000 for stock based upon its excessive valuation. The Woodbury was purchased for \$22,500 when the company was first organized. It was a small concern, and the organizers figured that a capitalization of \$25,000 would be suffi-

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cient, and that, in addition to the Woodbury, \$10,000 would be required. The value of the Woodbury was accordingly fixed at \$15,000, irrespective of the amount expended in its purchase. When it was desired to increase the capital stock, they increased the value of the Woodbury to \$20,000, and held it at this valuation in determining the net surplus to be divided among the stockholders in payment of the issuance of the increased capital stock. There was no need in March, 1910, for this corporation to act other than in good faith. It was apparently in a good financial condition, doing a good though small business. At that time there were no creditors seeking in any way to molest the company. It was not until September, 1911, that it was adjudicated an insolvent. This unfortunate ending in no wise reflects upon the good faith of the transaction in March, 1910. The stockholders were then dealing with themselves as they considered to be for the best interests of the company. No question of creditors loomed upon their horizon. There was no necessity for bad faith, for there was nothing to conceal and no one to deceive. The record admits of no other conclusion than that respondents acted fairly and honestly in making this stock dividend, and that they were honest in the belief that it was justified by reason of the company's possession of property equal in value to the capital stock so increased and above all liabilities.

The judgment is affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 12349. Department One. January 7, 1915.]

MELVINA LOWERY *et al.*, Respondents, v. THE CITY OF
SPOKANE, Appellant.¹

MUNICIPAL CORPORATIONS—CLAIMS—PERSONAL INJURIES—DESCRIPTION—SUFFICIENCY. A notice of claim against a city for injuries to the back part of both legs, and to the left heel and tendon Achilles, further alleging that plaintiff was crushed and bruised to such an extent that she could not walk, was sufficient to admit proof of broken bones in the foot and ankle resulting in "flat foot" or broken arch.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 30, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant,
and *Dale D. Drain*, for appellant.

Roche & Onstine, for respondents.

PARKER, J.—The plaintiffs seek recovery for personal injuries which they claim resulted to the plaintiff Melvina Lowery from the negligence of the city of Spokane in permitting a boiler to be insecurely placed over a public sidewalk along which she was walking, which boiler, by reason of its insecure position, fell and injured her. Verdict and judgment being rendered in favor of the plaintiffs in the sum of \$1,350, the city has appealed therefrom.

The principal contentions of counsel for the city are, in substance, that the trial court permitted counsel for respondents to introduce evidence upon the trial tending to show injuries the nature and extent of which were not sufficiently claimed or described in their claim of damages presented to the city preliminary to the commencement of this action. The city charter provides that such claims must

¹Reported in 145 Pac. 181.

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state the time when and the place where such injury was received or happened, the cause, the nature and extent thereof. After describing the location and the position of the boiler over the sidewalk in front of a plumbing shop, respondents state in their claim as follows:

"Said Melvina Lowery being in the exercise of ordinary care, passed along in front of said shop, the said boiler, by reason of the defective and negligent manner in which it was held in position, fell from its position across the said sidewalk and struck the said Melvina Lowery on the back part of both her right and left leg, and left heel and tendo Achilles, with such force and weight as to knock her to the ground and permanently injure her.

"That by reason of the force and weight of said boiler, the back of her legs and left heel and tendo Achilles thereof have been crushed and bruised to such an extent that she has been unable to walk, and has been constantly confined to her bed and ever since has been, and still is, caused to suffer great pain and anguish, and will continue to suffer great pain and anguish by reason thereof for some time in the future and perhaps the balance of her life, and by reason of said injury her nervous system has been greatly shocked and affected and she is caused to continuously suffer by reason thereof, and is permanently injured."

In their complaint respondents allege injuries to the bones of the foot and ankle of respondent Melvina Lowery, as well as the injuries to "the back and her legs and left heel and tendo Achilles thereof" mentioned in their claim presented to the city. In support of these allegations, evidence was introduced in behalf of respondents, over objections of counsel for the city, tending to show, in addition to the injury to the back of the legs and heel, the existence of what is known as "flat foot," sometimes called "broken arch," as the result of respondent Melvina Lowery's being struck by the falling boiler while she was walking past it. This evidence, it is insisted by counsel for the city, was not admissible because it related to injuries not mentioned or described in respondents' claim presented to the city before commencing their action.

We think that the injuries which this evidence tended to prove were so nearly related in location and character to those mentioned in the claim that they should be regarded as a portion of the injuries for which respondents claimed damages at the time of presenting their claim to the city. In *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449, after reviewing our former decisions at some length and noticing the liberal construction theretofore given by us to such claims for damage, Justice Ellis, speaking for the court, said:

"These, and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful, rather than a reasonable protection against the fraudulent and designing. . . .

"Applying these rules to the case before us, it is obvious that the notice that the claimant's leg was 'fractured and bruised to such an extent that he was compelled to undergo a surgical operation,' should be held sufficient to allow proof of a bruised leg from the knee to the foot, and an ankle so sprained and ligaments so ruptured as to necessitate a surgical operation, which was the proof made. The injuries described in the notice and those proved were so nearly related in location and character that notice leading to inquiry and examination as to the one would necessarily afford full knowledge as to the other."

We conclude that the admission of this evidence, in addition to evidence tending to show injury to the back of the leg and heel, was not erroneous.

Contention is made that the evidence was not sufficient to support the verdict and judgment. It is enough to say that a review of the evidence convinces us that it was ample for that purpose.

The judgment is affirmed.

Crow, C. J., Gose, Morris, and Chadwick, JJ., concur.

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[No. 11518. *En Banc*. January 8, 1915.]

A. J. GUSTAVESON, *Respondent*, v. GEORGE DWYER,
Appellant.¹

LIMITATION OF ACTIONS—AGAINST COUNTY—TAX TITLE HELD BY COUNTY—ADVERSE POSSESSION—ESTOPPEL. Property purchased by a county at a general tax foreclosure sale for want of other purchasers, and held in trust for the state, county, and other political subdivisions entitled to an apportionment of the tax on a resale, is taken and held by the county in its governmental capacity, as distinguished from its proprietary capacity, in the exercise of the sovereign power of taxation; hence the statute of limitations does not run in favor of one in the adverse possession of the land while the title was held by the county; nor would there be any element of estoppel, where the adverse claimant had not made improvements or paid any taxes (Gose and Chadwick, JJ., dissenting).

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 28, 1913, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

James Garvey, Guy E. Kelly, and Thomas MacMahon, for appellant.

A. O. Burmeister and Gordon & Remann, for respondent.

The Attorney General, Scott Z. Henderson, Assistant, and L. L. Thompson, amici curiae.

ON REHEARING.

PARKER, J.—This case is before us upon rehearing. It was decided in respondent's favor on February 28th last by Department Two of the court, upon the theory that the adverse possession upon which appellant rests his claim to the land involved did not sustain his claim of title because ten years had not elapsed since title to the land was in the county by virtue of the county having purchased it at tax sale for want of another purchaser, though appellant may have been in actual possession of the land since the purchase thereof by the

¹Reported in 145 Pac. 458.

county at tax sale more than ten years prior to the commencement of this action; and that the county purchased and held title in trust for the state as well as for the county and municipalities which were entitled to share in the tax for which the county purchased the land; thus preventing the statute of limitation from running in favor of appellant while title to the land was in the county. *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194.

In the Department decision, certain sections of our revenue statutes were noticed, from which the conclusion was drawn that, upon the purchase of the land by the county, the proceeds of sale thereof to be thereafter made by the county were by law required to be distributed to the state as well as the municipalities entitled to the tax for which the county was by law compelled to purchase the land for want of another purchaser. The trust relation which the Department decision assumed existed between the county and the state, upon the purchase of the land by the county, was rested upon these provisions of our revenue statutes alone; and upon this theory, the state being held to be a beneficiary having an interest in the land, the adverse possession of appellant was of no avail to him while the land was so held by the county, because the statute of limitations does not run against the state. Certain other sections of the revenue statutes are now called to our attention which lend some support to the present contention of counsel for appellant that this view of the statute entertained by Department Two was erroneous. However this may be, further consideration has led us to the conclusion that there is a broader view of the relation of the state to the title of the land thus purchased by the county, in pursuance of the statute at tax sale for want of another purchaser, which must control the question of adverse possession here presented.

While our general statute of limitations applies to actions by or for the benefit of counties and other municipalities (Rem. & Bal. Code, § 167; P. C. 81 § 79), it has been held

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that the statute does not apply as against a municipality so as to permit the acquisition of title by adverse possession to a portion of a street within the municipality. *West Seattle v. West Seattle Land & Improvement Co.*, 38 Wash. 359, 80 Pac. 549.

This holding rests upon the theory that such property is held by the municipality, or rather, controlled by it, in a governmental capacity for public purposes. And to hold the general statute of limitations applicable to actions involving title to property so held, would be to hold that such statute runs against the state. The rule touching the inapplicability of a general statute of limitations in such cases, although such statute by its terms be applicable to municipalities as well as private individuals, is stated in 19 Am. & Eng. Ency. Law (2d ed.), 191, as follows:

"The better rule seems to be that where a municipality seeks to assert rights which are of a public nature and such as pertain purely to governmental affairs, the exemption in favor of sovereignty applies and the statute of limitations will not constitute a bar unless it is expressly so provided. But in all other respects, counties, cities and other municipal subdivisions are governed by the statute as fully and to the same extent as individuals."

Upon this principle, the decisions of this court in *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115, and *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188, are rested, although those decisions involved the question of the general statute of limitations running against the state direct, at a time when the statute was in terms applicable to the state. It was there held that adverse possession could not impair the title of the state to school and university lands, upon the theory that such lands were held by the state for a specific public purpose and not in a mere proprietary capacity.

We regard the vital question here to be, does the county hold land acquired by purchase at tax sale for want of an-

other purchaser in a governmental capacity as distinguished from a proprietary capacity; since it is plain the statute would not run against the county in the former instance but would in the latter.

Looking to the power in the exercise of which the county's title to this land originated, we are constrained to hold that the county did not acquire or hold the land in a proprietary capacity, but in a governmental capacity. The land is not acquired by the county voluntarily but in the exercise of a mandatory duty prescribed by the state and in the exercise of the sovereign power of taxation. Rem. & Bal. Code, § 9268 (P. C. 501 § 265). It acts, in effect, as the agent of the sovereign, even though its action is largely for the benefit of the people of the county and the municipalities entitled to share in the tax for which the county is compelled to purchase the land for want of another purchaser. By the greater weight of authority, it is held that a general statute of limitations, though it may be in terms applicable to counties and other municipalities, will not bar the right of such municipality to enforce the collection of taxes. These holdings rest upon a principle which we regard as controlling here, although no decision has come to our notice dealing with the application of a statute of limitation to the exact situation here involved. In *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045, Judge Anders, speaking for the court, said:

"An action to recover a tax is an action to enforce a public right. And it has been held that the statute of limitations does not affect such actions, although it may be applicable to actions to enforce private rights. *Greenwood v. LaSalle*, 137 Ill. 225 (26 N. E. 1089); Black, Tax Titles, § 164; see also, *Sims v. Frankfort*, 79 Ind. 452, and 2 Dillon, Municipal Corporations, § 673."

That decision, however, was rested largely upon certain provisions of the special charter of Port Townsend.

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In *Osawatimie v. Board of Com'rs Miami County*, 78 Kan. 270, 96 Pac. 670, 130 Am. St. 369, there was involved a claim of the city against the county for funds, the proceeds of taxes, which had been collected by the county for the city and not accounted for. The county invoked the general statute of limitations which apparently by its terms was applicable to counties and cities in that state. Disposing of this contention in holding that such statute had no application, Justice Mason, speaking for the court, said:

"Inasmuch as the city exists in part as an agency of the state for general governmental purposes, and its maintenance depends upon its power to levy and collect taxes, it might be argued that the state itself, or the general public, has an interest in protecting the exercise of that power. But the same argument might apply, although with less force, to the prosecution of any money demand, upon the ground that the purpose of enforcing it is to aid in meeting the expenses of maintaining the municipality. We think the more vital consideration has relation to the character of the power in exercise of which the demand originates. The power of taxation is an essential attribute of sovereignty. This is true no less of taxes levied by minor political divisions than of those directly imposed by the state. (27 A. & E. Encycl. of L. 620.) No statute of limitation should apply to any step in the exercise of that power unless a legislative intention that it should do so is expressly stated or appears by the clearest implication."

In *Greenwood v. Town of LaSalle*, 137 Ill. 225, 26 N. E. 1089, an action to recover taxes where the general statute of limitation was invoked as a defense, which by its terms was applicable to cities and towns, Justice Wilkin, speaking for the court, said:

"The question to be determined in this case is, therefore, does appellee here seek to enforce a private right. This question, we think, must be decided in the negative. A town, under our township organization system, is but a civil division of a county, and exists as a municipal corporation merely for the purposes of carrying on the state government. It can only levy and collect taxes for the purpose of carrying on that

subdivision of such government. It must be admitted that town taxes may be levied for purposes in which the public, generally, are directly interested, such as 'constructing or repairing roads, bridges or causeways' within the town. (Rev. Stat. chap. 139, art. 4, sec. 40; *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38.) Other improvements may also be lawfully paid for out of a town tax, in which the public at large have as much interest as those residing within the boundaries of the township. We entertain no doubt that the right here sought to be enforced is of such a public nature that no statute of limitations could be interposed against it."

In *Wastenev v. Schott*, 58 Ohio St. 410, 51 N. E. 34, where a general statute of limitation was invoked in defense of an action to collect taxes, the court in holding such statute not applicable to such cases observed:

"When the action, though brought in the name of the state, is prosecuted for the enforcement of some private or individual right, and the state has no substantial interest in the litigation, the plea of the statute may be interposed. On the other hand, if the state is the real party in interest, the plea of the statute is not available though the action be not prosecuted in its name; and actions under section 2859, of the Revised Statutes, for the recovery of personal taxes, are, we think, of that character, and not subject to the bar of the statute, notwithstanding they are required to be brought in the name of the county treasurer. Revenues are essential to the maintenance of the state and the execution of its governmental functions. Taxation is a recognized constitutional and lawful means of raising such revenues for most, if not all public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, al-

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though local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state; and while it was probably deemed impracticable to create a lien on personal property for the taxes laid against it, the fund derived from them is expended in common with that arising from real estate taxes, and for the same purposes."

In *Hagerman v. Territory*, 11 N. M. 156, 66 Pac. 526, the action was brought by the county authorities to recover delinquent taxes, the statute expressly declaring such taxes sought to be thus collected, to be the property of the county. In holding against the contention that the general statute of limitations was a defense, the court said:

"It is further insisted by the appellant that the general principle that the ordinary statute of limitations cannot be interposed to defeat a claim of the government, has no application to the case at bar, as the government, i. e., the Territory of New Mexico has no interest in the taxes delinquent July 1, 1895, here involved, the Legislature having provided (Section 21, chap. 60, Session Laws 1897; section 4184, C. L. of N. M. 1897) that 'all delinquent taxes due the Territory on the first day of July, 1895, are hereby declared to be the property of the respective counties in which the same are assessed, and when collected, shall be paid to the general county fund of the several counties of the Territory.' We think, however, that the principle has application to this case. Under our system of government a county is a civil subdivision of the Territory, and exists as a municipal corporation merely for the purpose of carrying on the territorial government; and it is well settled that the plea of the statute of limitations is no defense to those actions by such corporation involving public rights, such as taxation, unless the statute expressly so provides."

It is apparent from the doctrine of these authorities that a general statute of limitations has no application, whether the

tax sought to be collected is to become the property of the state and payable directly into the state treasury, or whether it is to become the property of the particular county or municipality and payable into the municipal treasury to be expended for municipal purposes. In either case the tax has been imposed and collected for the express purpose of carrying on the functions of government. Among additional authority supporting this view, we note the following: *Delta County v. Blackburn*, 100 Tex. 51, 98 S. W. 419; *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734; *Simplot v. Chicago, M. & St. P. R. Co.*, 16 Fed. 350; *Board of Supervisors of Logan County v. City of Lincoln*, 81 Ill. 156; *People v. Hamill*, 259 Ill. 506, 102 N. E. 1052.

Like the Kansas court in *Osawatomie v. Board of Com'rs of Miami County*, above quoted from, we think the vital question here has relation to the character of the power in the exercise of which the county acquired the land at tax sale and thereafter held it. The case before us, it is true, does not involve the question of the bar of the statute of limitation as between the original owner of the land and the county; but we are unable to see that the acquiring the land and holding it thereafter is any less the exercise of a right emanating in the power of taxation than is the levy and imposition of the tax in the first instance. All of the rights of the county here involved are traceable to and rest in the sovereign power of taxation. It is not a proprietary right or power exercised by the county in either instance; but purely governmental, looking to the administration of governmental functions. We are of the opinion that the general statute of limitations, though by its terms made applicable to counties, does not run against the county in favor of an adverse possessor of the land while the title of the land rests in the county.

These conclusions may seem in conflict with our decision in *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999. Our views here expressed are plainly out of harmony

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with the expression found at page 180 of that decision, as follows:

"The property was held by the appellant in a proprietary capacity, as distinguished from the governmental or *quasi* governmental capacity."

That case involved Franklin county's claim to land acquired as this land was acquired in Pierce county. The statute of limitations was not there involved but the county was held to have lost its and the public's right to the land by estoppel, growing out of its questionable tax title and a compromise with the original owner allowing him to redeem the land. We think the ultimate conclusion of the court in that case would necessarily have been the same whether the land was regarded as being held by the county either in a proprietary or governmental capacity. That decision contains no discussion or citation of authority bearing upon the question of whether land so acquired by a county is held in a proprietary or governmental capacity. The fact that public streets may be lost to public use by vacation seems to furnish room for the working of estoppel as against a municipality affecting the loss of a street or portion thereof to the public, notwithstanding a street is held and controlled by a municipality in a purely governmental capacity. In *West Seattle v. West Seattle Land & Imp. Co.*, *supra*, the court rested its decision in favor of the city exclusively upon the inapplicability of the statute of limitations to such cases, pointing out that there was no element of estoppel affecting the right of the city or the public in that case, leaving the inference that the rights of the public in a street might be lost by estoppel. In *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072, the railway company was held to have acquired a franchise right in the street by estoppel growing out of acts of the city. This seems to be a recognition of the rule announced by a number of the courts, that would call for the ultimate conclusion reached by us in *Franklin County v. Carstens*, regardless of whether land acquired at tax sale by a county

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for want of other bidders is thereafter held by the county in a proprietary or governmental capacity. Hence, our decision in that case would have been the same whatever our views may then have been upon that question. We adhere to the conclusion there reached, but are of the opinion that, in so far as the language of the decision announces that the land was held by the county in its proprietary capacity, it should be overruled in the light of the authorities above noticed.

There is no element of estoppel here involved. While the land was held by the county by virtue of its purchase at tax sale appellant made no improvements thereon adding to its value in the least; nor did the county during that period levy any tax upon the land; nor has appellant ever at any time paid any taxes thereon.

We adhere to the final result reached in the Department opinion of February 28. The judgment of the superior court is therefore affirmed.

CROW, C. J., ELLIS, MORRIS, MOUNT, and MAIN, JJ., concur.

GOSE and CHADWICK, JJ. (dissenting).—We cannot acquiesce in the view that the immunity which protects taxes from the operation of the statute of limitations extends to property acquired by the county at a tax sale. The sale cancels and satisfies the taxes, penalties, interest and costs. The statute expressly so provides. The statute declares that the county acquires title to the property “as absolutely as if purchased by an individual.” Rem. & Bal. Code, § 9268 (P. C. 501 § 265). “No claims shall ever be allowed against the county from any municipality, school district, road district, or other taxing district for taxes levied on property acquired by the county by tax deed under the provisions of this act, but all taxes shall at the time of deeding said property be thereby cancelled.” Rem. & Bal. Code, § 9271 (P. C. 501 § 271). After a tax deed is issued to the county, the

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property may be sold by the county treasurer upon the order of the board of county commissioners at public sale to the highest bidder. Rem. & Bal. Code, § 9273. The crucial question is, Does the county hold land which it purchases at a tax sale in a governmental capacity or a proprietary capacity? We think the true test of the capacity in which the municipality holds property is the use to which the property is to be devoted. The property in question was not devoted to a public purpose nor was it essential to the exercise of municipal functions. It is true that the county took the land in lieu of the taxes, but when its title became complete it was subject to sale the same as any other property held in a proprietary capacity. In the last analysis, a municipality acquires title to all its property through the exercise of the sovereign power of taxation. Indeed, it is only by the exercise of the taxing power that it can acquire property or procure funds with which to perform its governmental functions. The tools and implements which the city or county purchases to be used in constructing and repairing roads and bridges are purchased with money derived through the taxing power. Are they held in a governmental capacity? The courts of the country are agreed that municipal corporations hold property and exercise functions in a dual capacity, viz., governmental and proprietary. The line of demarcation must necessarily be drawn somewhere. In respect to property, we think the test should be the use to which the property is to be devoted; that is, Is it to be used for the purpose of carrying on its governmental functions? If it is to be so used, the statute of limitations does not apply; otherwise, the plea of the statute may be invoked.

We therefore dissent.

[No. 11809. Department One. January 8, 1915.]

H. E. VINCENT *et al.*, *Appellants*, v. THE CITY OF SOUTH BEND, *Respondent*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—PRELIMINARY ESTIMATE—INCREASE—VALIDITY. The estimate of the cost of a local improvement, required by Rem. & Bal. Code, § 7974, to be approved by the council on the initiation of the proceedings, is for the sole purpose of determining whether the council will initiate the improvement, and the assessment is not invalidated by the fact that it greatly exceeds the estimate, where it did not exceed the actual *bona fide* or ultimate cost of the improvement, and can readily be accounted for by changed conditions; in view of Rem. & Bal. Code, § 7983, providing that, when the estimated cost is found too high or too low, the city shall, after due notice and hearing, make rebates or add the required additional amount to the assessment roll, apportioning the amount to the several pieces of property benefited as if it had been an original estimate.

SAME—ORDINANCES—INDEFINITENESS. An ordinance authorizing a local improvement and assessment therefor cannot be held void for indefiniteness, where it follows the lines of the statutory requirements conferring such power upon municipalities and contains all the material provisions therein set forth.

Appeal from a judgment of the superior court for Pacific county, Wright, J., entered September 24, 1913, upon findings in favor of the defendant, approving a local improvement assessment roll, upon appeal from the city council. Affirmed.

H. W. B. Hewen, for appellants, contended, among other things, that clear and definite specifications are a mandatory requirement in ordering a local improvement. *Pueblo v. Winters*, 47 Colo. 255, 107 Pac. 224; *Oklahoma City v. Shields*, 22 Okl. 265, 100 Pac. 559; *Grant v. Barber*, 135 Cal. 188, 67 Pac. 127; *Bay Rock Co. v. Bell*, 133 Cal. 150, 65 Pac. 299; *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *State*

¹Reported in 145 Pac. 452.

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ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 264. Changing grades and estimate, see *City of Argentine v. Simmons*, 54 Kan. 699, 37 Pac. 14.

Fred M. Bond, and *Welsh, Welsh & Richardson*, for respondent.

MORRIS, J.—Appeal from a judgment below confirming a local improvement assessment roll. The city of South Bend is a city of the third class, and on April 17, 1911, its city council passed an ordinance providing for the filling of certain low lands and tide lands within the city, the ascertainment of the damages for property taken or damaged, creating an improvement district, and providing for an assessment upon property benefited. The filling of the designated area was to be made in accordance with certain plans and specifications on file in the office of the city engineer showing a fill averaging approximately three feet in depth. Section 7 of this ordinance fixed the estimated cost of the improvement at the sum of \$9,500, providing that, if, after the making up of the assessment roll, this estimated cost should be found too high, the excess should be rebated *pro rata* to the property owners; but that, if, on the other hand, it should prove too low, the city council upon due notice and hearing might add the required amount to the assessment roll to be apportioned among the several parcels of land upon the same basis as the amount originally included. Other provisions of the ordinance need not be referred to. It is enough to say it was the kind of ordinance usually passed with such purpose in mind.

The Federal government was, at this time, contemplating the dredging of the Willapa river through the city of South Bend, and the intention of the city in initiating the improvement at this time was to take advantage of this situation and obtain the material for filling these low lands at a nominal cost, it being estimated that the dirt so obtained would fill the entire district to a depth of eighteen inches, the remaining

eighteen inches to be provided for by a subsequent plan not then determined. The city and the Federal officials entered into a contract under which the dirt from the river was to be deposited upon the area embraced within the district, free of cost for a distance of fifteen hundred feet, and beyond that a small charge per cubic yard was to be made. Anticipating this arrangement, the cost of the improvement was fixed at \$9,500.

After proceeding with the work, the officials in charge of the government work informed the city officials that all the material would be deposited within a 1,500-foot limit. The effect of this procedure was to increase the fill within the 1,500-foot area from eighteen inches, as at first contemplated, to thirty-six inches, and leave that part of the district outside of the 1,500-foot limit in the same situation it had been before the work was undertaken, save that, between it and the river, its natural drainage, the ground had been raised thirty-six inches. Another effect was that those living within the 1,500-foot limit who had raised their buildings to accommodate an eighteen-inch fill were compelled to provide for a thirty-six-inch fill. The city council thereupon, partly upon its own initiative and partly upon the petition of some of the property owners, entered into a contract with a dredging company to fill that part of the district lying outside of the 1,500-foot limit. This contract was performed, making the actual cost of the improvement to be borne by property benefited \$89,199.92, instead of \$9,500. Some of the appellants were among those petitioning for this second fill; others were not. The assessment roll as confirmed is made upon the basis of the actual cost, thus materially increasing the assessment upon benefited property from what it would have been under the original estimates.

There is some attack made upon the findings of the lower court. We find them amply sustained by the record and they are adopted. This local improvement district was established pursuant to the act of 1909, Rem. & Bal. Code, §§ 7971-

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7987 (P. C. 77 §§ 853-885), both inclusive. This act provides that the cost of all improvements instituted under the act shall be borne by special assessment upon the property benefited, if the ordinance directing the improvement shall so provide. Section 7974 (P. C. 77 § 859), provides that, at the time of the initiation of the improvement, the city council shall cause an estimate to be made of the cost and of the expenses incident to the improvement, which estimate shall be approved by the city council. Section 7983 (P. C. 77 § 877), provides that, when an assessment roll is made up and it is found that the estimated cost is too high, the excess shall be rebated *pro rata* to the property owners, but that when the estimated cost is found to be too low, and the actual *bona fide* cost of the improvement is greater than the estimate, the city shall, after due notice and hearing, add the required additional amount to the assessment roll, apportioning the amount to the several pieces of property benefited as if it had been an original estimate. Referring to the provisions of the ordinance as quoted, it will be seen that the ordinance contained these provisions of the statute. This provision for an assessment roll that shall represent the actual *bona fide* cost of the improvement irrespective of the estimate is so clear that it requires no interpretation.

Counsel for appellants says, in his brief, that the trial court based its judgment largely on the opinion that the estimate of cost of the fill contained in the ordinance was not for the information, benefit, or protection of the owners of the property, but only for the guidance of the municipal officials. The lower court might well have based its conclusion upon this contention, for it must be upheld as a correct interpretation of the statute. The only purpose of this estimate is to influence the city council in determining whether it will initiate any given improvement, the right of the property owner to be determined by the actual *bona fide* cost of the improvement which, when it exceeds the estimated cost, can only be assessed against the property benefited after due notice and hearing, at

which time all the rights of the property owner may be protected. The amount of excess is large in this case, but there is no showing that the excess amount does not represent the actual *bona fide* cost of the improvement. In fact, there is no attempt to make such a showing, it being conceded, so far as the record goes, that the ultimate cost was the *bona fide* actual cost. The excess is readily accounted for when it is understood that, instead of being made at a nominal cost as was first contemplated under the arrangement with the government engineers, it was necessary to make arrangements with private contractors to complete the work that should have been undertaken and completed under the contract with the government engineers, thus largely increasing the cost of the improvement, but not increasing the assessment beyond the actual *bona fide* cost of the improvement. Such an assessment is valid. *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; 2 Page & Jones, Taxation by Assessment, § 819.

It is contended that the ordinance is void for indefiniteness and want of specification. We do not so find it. The ordinance is too long to be set out in full. A reading of it in connection with the statute is convincing that it contains all the material provisions and is a full compliance with the statutory requirements. There is also an attempt to show lack of benefits. Upon this point, as is usual in cases of this character, the evidence is conflicting; but we agree with the court below that it strongly preponderates in favor of the benefit assessed. Other attacks are made upon the assessments, but without making special reference to them for want of time and space, we find regularity in all the proceedings and no escape open to these appellants from assuming the burden that has been rightfully cast upon their lands in the manner provided by law.

The judgment is affirmed.

Crow, C. J., Gose, and Parker, JJ., concur.

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[No. 11899. Department One. January 8, 1915.]

E. O. FERRELL *et al.*, *Appellants*, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

CARRIERS—INJURIES—LETTING OFF PASSENGERS—PROXIMATE CAUSE—OPEN DOOR—SUDDEN JERKS. The opening, by the conductor, of the door of a pay-as-you-enter style of street car, just as the car was about to reach its stopping place, is an invitation to a passenger to pass out of the car or at least to enter the vestibule, where it appears that the passenger had started to get off at the last street, and upon being told that her destination was the next street, she stood near the door facing the conductor; and hence is the proximate cause of the accident, where she was thrown or fell out when the car started forward with a sudden jerk while the door was open and the car in motion.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 20, 1913, granting a nonsuit in an action for personal injuries sustained by a passenger on a street car. Reversed.

W. H. Plummer and Joseph J. Lavin, for appellants.

Post, Avery & Higgins, for respondent.

CHADWICK, J.—Plaintiff Anna Ferrell was a passenger on a Riverside avenue street car operated by the defendant company, in the city of Spokane. She intended to alight at Stevens street, which is one block east of Howard street. When the car, which was a pay-as-you-enter car having gates at the rear, arrived at Howard street, plaintiff started to alight. She was told that she had not arrived at her destination which was one block to the east. She stood in the aisle, holding a perpendicular handle bar inside of the door leading into the vestibule of the car. The vestibule was a few inches lower than the floor of the car. As the car approached its stopping place on the off side of Stevens street, the conductor opened the gates while the car was still moving. Appellant

¹Reported in 145 Pac. 442.

says that, thinking the car had stopped, she stepped down into the vestibule, when, within a moment of time, the car gave a sudden jerk or lurch forward, and she was thrown out of the car and onto the pavement, sustaining the injuries of which she complains. A further statement of the facts is unnecessary to a discussion of the legal principles involved. Plaintiff appeals from a judgment of nonsuit.

The determinative question is, What was the proximate cause of the injury? It is insisted that there is no showing of negligence in that the opening of a gate upon a street car is not an invitation to a passenger to alight, and further that a showing that the car gave a sudden jerk or lurch is not enough to satisfy the law, which demands that there be a showing of negligent operation upon the part of the motorman or that the track or equipment was defective. An answer to the question, What was the proximate cause of the injury? will be decisive of the case. Respondent relies upon the following cases: *Crowley v. Boston Elev. R. Co.*, 204 Mass. 241, 90 N. E. 532; *Hannon v. Boston Elev. R. Co.*, 182 Mass. 425, 65 N. E. 809; *Gagnon v. Boston Elev. R. Co.*, 205 Mass. 483, 91 N. E. 875; *Bullock v. Butler Exchange Co.*, 22 R. I. 105, 46 Atl. 273; *Cashman v. New York, N. H. & H. R. Co.*, 201 Mass. 355, 87 N. E. 570; *Wile v. Northern Pac. R. Co.*, 72 Wash. 82, 129 Pac. 889; *McCann v. Boston Elev. R. Co.*, 199 Mass. 446, 85 N. E. 570, 127 Am. St. 509, 18 L. R. A. (N. S.) 506; *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; and *Work v. Boston Elev. R. Co.*, 207 Mass. 447, 93 N. E. 693.

In many of these cases it is held, under the facts occurring in the particular case, that the opening of the door or gate of a car or elevator is not an invitation to the passenger to alight from or enter the vehicle. The cases relied on were reviewed and were the subject of consultation in the case of *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343. We were there of opinion that a hard and fast rule, that the opening of a door or gate on a moving

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vehicle is not an invitation to a passenger, could not be laid down. Whether it was such invitation was a mixed question of law and fact, to be resolved in the light of all the attending facts and circumstances. It is a matter of common knowledge that transportation companies are adopting cars of the pay-as-you-enter type, having gates under the control of the motorman or conductor. A reason, among others, for installing them is that passengers may be protected from their own folly and negligence, and that the company may be saved from the consequences of negligent operation by its own servants while passengers are entering or alighting therefrom. The books are full of cases where passengers have claimed injuries in consequence of a sudden starting or stopping or jerking or lurching of the car just as they were about to get off or get on. One of the principal objects sought to be accomplished by the use of such cars is to overcome the uncertainty of oral testimony, by the use of a mechanical appliance.

Having these considerations in mind, and assuming that it is a matter of common knowledge of a passenger that the gates of a pay-as-you-enter car are closed while it is in motion, we think it would be going too far to hold that the opening of the door was not an invitation to appellant to pass out of the car, or at least to step down into the vestibule. She had undertaken to pass out of the car at Howard street. When informed of her mistake, she remained standing, facing the conductor. The jury might well infer that, with her mind intent upon her destination, the opening of the door was an invitation to her. If we admit that there was no such lurch or jerk as to warrant a recovery, the fact remains that the accident would not have happened if the door had not been opened while the car was in motion. This conclusion is well within the doctrine of *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049. In that case the elevator had landed about four or five inches below the

level of the floor. Plaintiff entered without looking, and fell. Contributory negligence was set up as a defense. The court said: "The open door, with the elevator boy at his post, was an invitation to enter."

Counsel sincerely argue the insufficiency and probable untruth of appellant's evidence. Whatever our opinion may be, its credibility was a question for the jury.

We are of the opinion that the case should have gone to the jury. Reversed and remanded for a new trial.

Crow, C. J., Gose, Morris, and Parker, JJ., concur.

[No. 11908. Department One. January 8, 1915.]

GEORGE W. DETAMORE *et al.*, Appellants, v. W. J. HINDLEY
et al., as Commissioners *etc.*, Respondents, CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY,
*Intervener and Respondent.*¹

CONSTITUTIONAL LAW—POLICE POWERS—DELEGATION. Const., art. 11, § 11, authorizing cities to make and enforce within their limits all such . . . police . . . and other regulations as are not in conflict with the general laws is a direct delegation of the police power, as ample within its limits as that possessed by the legislature.

RAILROADS—CHANGING GRADE CROSSINGS—POLICE POWER. It is a legitimate exercise by a city of the police power to require a separation of grades where a public service railroad crosses a city street, and is in accord with general laws (Rem. & Bal. Code, §§ 7507, 7510).

MUNICIPAL CORPORATIONS—FRANCHISES—ULTRA VIRES—RAILWAY BRIDGES OVER STREETS. Under the delegation of police powers to cities conferred by art. 11, § 11, of the state constitution, and under Rem. & Bal. Code, §§ 7507, 7510, conferring power upon cities of the first class to authorize and regulate the construction and operation of railroads within the corporate limits, to construct and keep in repair bridges, viaducts and tunnels, to authorize the location, construction and operation of railroads "in, along, over and across any highway" or street, the action of the city in granting a franchise

¹Reported in 145 Pac. 462.

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ordinance to a railway to construct bridges over certain streets is not *ultra vires* as being in excess of corporate powers; since not only the power to compel the separation of street grades at railroad crossings is a legitimate exercise of the police power, but authority is expressly conferred by the employment of the word "over" in conjunction with "in, along and across," in the statute authorizing the grant of such ordinances.

SAME—STREETS—REGULATION AND CONTROL—REVIEW BY COURTS. Since the power to require grade separations for streets and railways exists as an integral part of the police power of the city, the appropriate means to its exercise rests largely in the discretion of the city's governing body, and, in the absence of a clear abuse, will not be interfered with.

SAME—USE OF STREETS—RAILROAD BRIDGES. There is shown a reasonable necessity for supports for overhead railway bridges requiring spans across the street more than forty feet in length, although it was possible to construct bridges without such supports, where the franchise required bridges without supports only in case the span would be less than forty feet, and where it appears the location was sparsely settled, the widest piers were three feet and one-half in thickness, and left passageways for vehicles from twenty-two to sixteen feet in width on each side of the central pier, and sidewalk space on both sides of the street eleven and one-half feet in width over the graded streets.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered November 24, 1913, upon granting a nonsuit, dismissing an action for a writ of mandate, after a trial to the court. Affirmed.

Skuse & Morrill, for appellants.

F. M. Dudley (*H. M. Stephens*, *W. E. Richardson*, and *Geo. W. Korte*, of counsel), for respondents.

ELLIS, J.—In this action, the plaintiffs sought a writ of mandate requiring the defendants, commissioners of the city of Spokane, to cause to be removed from Erie, Ivory, Denver, Perry, Hogan, Helena, Madelia, Magnolia, Pittsburgh and Napa streets, in that city, the supports of certain bridges or overhead crossings maintained therein by the intervener, Chicago, Milwaukee & St. Paul Railway Company for its railroad tracks.

level of the floor. Plaintiff entered without looking, and fell. Contributory negligence was set up as a defense. The court said: "The open door, with the elevator boy at his post, was an invitation to enter."

Counsel sincerely argue the insufficiency and probable untruth of appellant's evidence. Whatever our opinion may be, its credibility was a question for the jury.

We are of the opinion that the case should have gone to the jury. Reversed and remanded for a new trial.

Crow, C. J., Gose, Morris, and Parker, JJ., concur.

[No. 11908. Department One. January 8, 1915.]

GEORGE W. DETAMORE *et al.*, *Appellants*, v. W. J. HINDLEY
et al., *as Commissioners etc., Respondents*, CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Intervener and Respondent.¹

CONSTITUTIONAL LAW—POLICE POWERS—DELEGATION. Const., art. 11, § 11, authorizing cities to make and enforce within their limits all such . . . police . . . and other regulations as are not in conflict with the general laws is a direct delegation of the police power, as ample within its limits as that possessed by the legislature.

RAILROADS—CHANGING GRADE CROSSINGS—POLICE POWER. It is a legitimate exercise by a city of the police power to require a separation of grades where a public service railroad crosses a city street, and is in accord with general laws (Rem. & Bal. Code, §§ 7507, 7510).

MUNICIPAL CORPORATIONS—FRANCHISES—ULTRA VIRES—RAILWAY BRIDGES OVER STREETS. Under the delegation of police powers to cities conferred by art. 11, § 11, of the state constitution, and under Rem. & Bal. Code, §§ 7507, 7510, conferring power upon cities of the first class to authorize and regulate the construction and operation of railroads within the corporate limits, to construct and keep in repair bridges, viaducts and tunnels, to authorize the location, construction and operation of railroads "in, along, over and across any highway" or street, the action of the city in granting a franchise

¹Reported in 145 Pac. 462.

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ordinance to a railway to construct bridges over certain streets is not *ultra vires* as being in excess of corporate powers; since not only the power to compel the separation of street grades at railroad crossings is a legitimate exercise of the police power, but authority is expressly conferred by the employment of the word "over" in conjunction with "in, along and across," in the statute authorizing the grant of such ordinances.

SAME—STREETS—REGULATION AND CONTROL—REVIEW BY COURTS. Since the power to require grade separations for streets and railways exists as an integral part of the police power of the city, the appropriate means to its exercise rests largely in the discretion of the city's governing body, and, in the absence of a clear abuse, will not be interfered with.

SAME—USE OF STREETS—RAILROAD BRIDGES. There is shown a reasonable necessity for supports for overhead railway bridges requiring spans across the street more than forty feet in length, although it was possible to construct bridges without such supports, where the franchise required bridges without supports only in case the span would be less than forty feet, and where it appears the location was sparsely settled, the widest piers were three feet and one-half in thickness, and left passageways for vehicles from twenty-two to sixteen feet in width on each side of the central pier, and sidewalk space on both sides of the street eleven and one-half feet in width over the graded streets.

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Skuse & Morrill, for appellants.

F. M. Dudley (*H. M. Stephens, W. E. Richardson, and Geo. W. Korte*, of counsel), for respondents.

ELLIS, J.—In this action, the plaintiffs sought a writ of mandate requiring the defendants, commissioners of the city of Spokane, to cause to be removed from Erie, Ivory, Denver, Perry, Hogan, Helena, Madelia, Magnolia, Pittsburgh and Napa streets, in that city, the supports of certain bridges or overhead crossings maintained therein by the intervener, Chicago, Milwaukee & St. Paul Railway Company for its railroad tracks.

The case was tried upon a statement of agreed facts in substance as follows: In January and May, 1910, the Chicago, Milwaukee & Puget Sound Railway Company, predecessor in interest of the intervener, applied for certain franchise ordinances permitting the crossing of the streets in question with its tracks to be laid at grade. The city council refused to grant the application, but required that the tracks be carried over the streets in the manner specified in two ordinances finally passed on June 14, 1910, and February 23, 1911. These ordinances are in evidence. They prescribe the manner in which the bridge or viaduct crossing each of the streets in question should be constructed. These provisions we shall not notice more specifically, since it is not claimed that the actual structures do not conform to the ordinances. These ordinances then provide that the bridges or viaducts shall be constructed either of steel or concrete, or a combination of these, and shall preserve such width of roadway and sidewalks as may be determined by the city council, but that, if the bridges be made of steel, they shall be constructed without center posts unless the span extending over the street from curb to curb is more than forty feet in length. It is further provided that the grantee shall be permitted to erect temporary wooden viaducts which shall be replaced by permanent structures as required by ordinance within three years.

After receiving the franchise, and prior to constructing its road, the Puget Sound Company filed with the city council plans, specifications, and profiles showing the elevations of the bridges and viaducts which it proposed to construct. These were approved by the city council. The intervener, by an assignment of the franchise ordinance, has succeeded to all the rights of the Puget Sound Company in the premises.

Between December 1, 1911, and January 1, 1913, all the bridges were completed. Those over Denver, Perry, Hogan, Helena and Madelia streets were constructed of

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reinforced concrete. Those over Pittsburgh, Magnolia, Erie and Ivory streets were of wood. The tracks were carried over Napa street on a wooden bridge previously constructed by and belonging to the Spokane & Inland Empire Railroad Company. It is admitted that the additions to this bridge made necessary by its use by the intervener do not materially add to the obstruction of the street.

The bridge over Denver street is typical of the concrete structures. It is supported by three rows of concrete piers, one in the middle and one on each side of the street at the curb line. There are four piers in each row twenty feet in height over the roadway, the base of the center piers in the middle of the street being three feet six inches wide and thirty feet eight inches in length, lengthwise of the street. The piers on each side of the street at the curb line are on bases two feet seven inches wide, and twenty-seven feet in length, lengthwise of the street. Between the center piers and the curb line piers on each side, is a clear roadway of twenty-two feet. Between the curb line piers and the property line, on each side, is a clear sidewalk space of eleven feet six inches.

The wooden bridges follow the same general plan. The clear roadways on each side of the central supports vary from sixteen to over twenty feet, save that on Ivory Street there is a single clear driveway over thirty-three feet wide between the bents. Neither of the streets crossed by the temporary wooden bridges has ever been graded, save such grading as was done by the railroad company in constructing the bridges. Bridges without supports resting in the streets would have required a span in each instance of much over forty feet in length.

The total cost of all these bridges was approximately \$110,000. The plaintiffs had notice and knowledge that the bridges were being constructed but made no complaint to any one until the month of May, 1913, more than five months after they were all completed.

In addition to the stipulation, the plaintiffs offered in evidence a picture of another bridge crossing a street with a span of over eighty-four feet. This was offered for the purpose of showing the practicability of constructing the bridges in question without supports in the street. The offer was refused.

When the plaintiffs had rested their case, the defendants and intervener moved for a dismissal for the reasons, among others, that none of the structures complained of are unlawful, and that the plaintiffs by their laches are estopped from maintaining their action. The motion was granted in its entirety and the action was dismissed. The plaintiffs have appealed.

The briefs take a wide range and discuss many interesting questions, but the principal contention of the appellants is that the provisions of the franchise ordinances, authorizing the carrying of the railroad tracks over the streets on bridges having supports within the street lines, are *ultra vires*. This presents a question going to the very basis of the case. If the power exists and was not abused, the writ was properly denied, and a consideration of the other questions becomes unnecessary.

It is admitted that the legislature has the power to confer upon a municipality the authority to authorize the placing of these supports in the street. It is conceded that the city has sufficiently authorized them, if it has been so empowered. The one vital question, therefore, is: Has the requisite power been granted to the municipality? The answer must be found in the fundamental and statutory law of this state.

The state constitution, § 11 of article 11, provides:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as

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the subject-matter is local, and the regulation reasonable and consistent with the general laws. *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, 140 Cal. 226, 73 Pac. 987.

Where a public service railroad crosses the streets of a city, the power to compel the separation of grades and to authorize means to that end, not unreasonably impairing the use of the street by the public, is a legitimate exercise of the police power so conferred in the interest of the public safety. Any change in the street so necessitated is a public use. *Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 651, 135 Pac. 636; *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

Such an exercise of the broad police powers by a city is not only not in conflict with the general laws of this state, but is in direct accord with them. The statute defining the powers of cities of the first class, Rem. & Bal. Code, § 7507 (P. C. 77 § 83), declares:

"Any such city shall have power . . .

"(9) To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads; . . .

"(12) To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof;"

By an act of 1907, Rem. & Bal. Code, § 7510 (P. C. 77 § 1201), the legislature further declared:

"Any city of the first class shall have the power by ordinance to authorize the location, construction and operation of railroads in, along, over and across any highway, street, alley or public place in such city, for such term of years and

upon such conditions as the city council of such city may by ordinance prescribe. . . .”

It will be noted that these provisions relate to commercial as well as street railroads. It will also be noted that, by the statute last quoted, the power is given to authorize their location, construction and operation, not only along and across the street or highway, but also *over* it. The authority conferred by subdivision 9 of § 7507: “to prescribe the terms and conditions upon which” the railroad may be constructed, coupled with the authority “to provide by ordinance for the protection of all persons and property against injury in the use of such railroads,” is clear authority, if any were needed in addition to that granted by the constitution, to provide for a grade separation by carrying the tracks over or under the street. Moreover, the grant contained in § 7510 of the power to authorize the location, construction and operation of railroads “in, along, over and across any highway, street, alley, or public place in such city . . . upon such conditions as the city council of such city may by ordinance prescribe” is clear and explicit.

It is plain that these statutes empower the city to authorize the construction of railroads in the streets longitudinally as well as transversely. Such is the clear import of the words “along and across.” *Cook County v. Great Western R. Co.*, 119 Ill. 218, 10 N. E. 564.

In fact we have held that a statute giving power to cities of the fourth class to authorize the laying of tracks on the streets, without the use of the words “along and across” (Rem. & Bal. Code, § 7731, subd. 13; P. C. 77 § 389), confers the power to authorize a longitudinal as well as a transverse construction. *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487. But the act of 1907, Rem. & Bal. Code, § 7510, uses the word “over” in direct conjunction with the words “along and across.” In view of the clear power to authorize the laying of tracks both lengthwise and across the street, and the clear police power to compel a

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separation of grades in the interest of public safety, it cannot be doubted that the legislature used the word "over" advisedly with the intent to confer power to authorize an overhead construction. We have so construed the word "over" in practically the same connection as used in the statute, Rem. & Bal. Code, § 9080 (P. C. 405 § 327), relating to the authorization of the construction of railroads of which the motive power is other than steam. *State ex rel. Ford v. Superior Court*, 67 Wash. 10, 120 Pac. 514.

It is true that, in that case some stress, *arguendo*, was laid upon the power given by the statute to prescribe "the grade or elevation at which the same shall be maintained or operated," but it is clearly held that the controlling words of the statute, even extending the meaning of the words last quoted, are the words "upon, over, along and across," coupled with the further provision giving the city power to prescribe "the terms and conditions" upon which such roads shall be constructed and operated. This is made plain by the following language:

"The relators say: 'The conferring of the power to prescribe the grade or elevation simply means that the legislature has said to the city council that you may have the power and authority to protect the inhabitants of the city whom you represent officially against any public service corporation, attempting to fix its line at an improper grade or elevation.' This argument is hardly in harmony with the contention that the city had no power to permit the construction of the road except upon the surface of the street. Moreover, such authority had already been conferred upon the council by the use of the words 'upon, over, along and across' and by the further provision giving it the power to prescribe 'the terms and conditions' upon which such roads shall be constructed, maintained, and operated."

Any other construction of the statute would make the word "over" superfluous. Statutes should, if possible, be so construed as to give every word its true significance. *Crozer v. People*, 206 Ill. 464, 69 N. E. 489.

So far as the question here involved is concerned, the controlling provisions of the two statutes, Rem. & Bal. Code, §§ 7510 and 9080, are practically identical. No just distinction can be found in the fact that the one relates to commercial railroads employing steam as the motive power and the other to street railroads employing electric or any motive power other than steam. In fact, conceding as we must, the power of the city to authorize the construction of both kinds of roads upon, along and across its streets, the necessity for the exercise of the police power by requiring a grade separation is obviously more imperative in the case of a steam road than of any other. It is clear that both the terms of the statute and the reasons for its enactment sustain the view that cities of the first class are empowered to authorize a separation of grades where commercial railroads are constructed either along or across the streets.

Whatever argument in favor of the city's power can be drawn from the condemnation statutes in the case of street railroads, is equally present in the case of commercial roads. By an act of 1903 (Laws of 1903, page 383) § 4334 of Ballinger's Code was amended so as to grant the power to railway companies to appropriate by condemnation "rights of way for tunnels beneath the surface of the land and any elevated rights of way above the surface thereof." This statute was reenacted in 1907 (Rem. & Bal. Code, § 8740; P. C. 405 § 85) by the same legislature which enacted § 7510, above quoted, giving express power to cities of the first class to authorize railway companies to construct their tracks "in, along, over and across" any street. True, the power of eminent domain cannot be exercised to appropriate the interest of the abutting landowner in the street until a franchise to use the street itself has been secured from the city. *State ex rel. Sylvester v. Superior Court, supra*. But that is equally true of an appropriation by a street railway company if it involves an injurious change of grade. It seems to us that the parallel is complete.

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Since the power to require the grade separation exists as an integral part of the police power of the city, the appropriate means to its exercise must rest largely in the discretion of the city's governing body. The courts will not interfere with that discretion in the absence of a clear abuse. *Wabash R. Co. v. City of Defiance*, 52 Ohio St. 262, 40 N. E. 89; *Murphy v. Chicago R. I. & P. R. Co.*, 247 Ill. 614, 98 N. E. 881. Piers reasonably necessary to that purpose and authorized by the city are not nuisances that can be enjoined by an owner whose property abuts on the street. *Gates v. Kansas City Bridge & Terminal R. Co.*, 111 Mo. 28, 19 S. W. 957; *Summerfield v. Chicago*, 197 Ill. 270, 64 N. E. 490; *Village of Winnetka v. Chicago & M. Elec. R. Co.*, 204 Ill. 297, 68 N. E. 407; *Seibert v. Missouri Pac. R. Co.*, 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72; *Miller v. Long Island R. Co.*, 17 Fed. Cas. No. 9,580, p. 332.

The appellants place their chief reliance on the decision of this court in *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576, in which we used language to the effect that a city of the first class in this state has no power to grant to a railway company the right to appropriate any part of the street to the entire exclusion of the public, and in effect that the granting of a franchise purporting so to do was *ultra vires*. The language used in that case, however, must be construed with reference to the facts of that case. There, one-half of the street for a distance of several hundred feet was surrendered to the absolute and exclusive use of the railroad company, not merely the space for supports for overhead crossings in aid of the safe use of the street by the public. The action of the city in that case could not be sustained by a reference to the police power. In that case there was an absolute surrender of a very material part of the street to serve alone the private use of the railroad company. Here no very material part of the street's surface is obstructed and that only to make the joint use of the street by the railroad company and the public

reasonably safe. The use of so much of the street for the base of such supports as may be reasonably necessary to carry the railroad tracks over the street in order to obviate the danger and inconvenience to the public of a grade crossing is not, in any just sense, a surrender of any portion of the street to the exclusive use of the railroad company. What is a material portion of a street is, of course, a relative matter. Three feet of the street's surface might be a very material encroachment in some localities and of little practical moment in others. The section of the city here in question is sparsely settled, and many of the streets are as yet not graded. Viewed in the light of the circumstances and conditions, the obstructions here in question are only technical obstructions. In view of the broad police powers of the city conferred by the constitution, and in view of the clear authority conferred by statute upon cities of the first class to authorize a separation of grades, where railroads are permitted to occupy the streets, we are constrained to hold that the authorization of the structures here in question was a valid exercise of the police power of the city and not an abuse of its discretion. While it may be true that nearly all of these bridges could have been constructed with a single span crossing the street and that the supports in the streets were, therefore, not absolutely necessary, still, since all of the spans would have exceeded forty feet, it is clear that the supports were reasonably necessary. In view of the end to be gained, namely the safe use of the streets, we think that a reasonable necessity is all that should be required.

Upon mature consideration, it seems to us that the true distinction, between the *Schade* case, on the one hand, and the *Ford* case and this case, on the other, is to be found in the fact that, in the *Schade* case, there was a clear abuse of the city's discretion and an improper exercise of its police powers, while here, there is no abuse of discretion, but a clearly proper exercise of that power.

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Any attempt to review the many authorities cited by appellants from other jurisdictions would uselessly extend this opinion. They are nearly all distinguishable on the facts, and in those which are not so distinguishable there was apparently lacking the broad police power conferred upon cities of the first class in this state or the express statutory power to permit the construction of railroads over the streets.

A persuasive argument is advanced by the respondents tending to sustain the courts' decision on the ground of the appellants' laches in making no complaint until the intervenor had expended over \$100,000 on the faith of its franchise. We prefer, however, to base our decision upon the broad ground of the police power, and the express statutory authority.

The judgment is affirmed.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

[No. 11975. *En Banc*. January 8, 1915.]

H. P. EMERY, *Respondent*, v. ANDREW J. LITTLEJOHN *et al.*,
Appellants.¹

INSANE PERSONS—DISCHARGE FROM HOSPITAL—TORTS OF INSANE PERSON—LIABILITY OF SUPERINTENDENT. Under Rem. & Bal. Code, § 5967, providing that any patient may be discharged from the state hospital for the insane when, in the judgment of the superintendent, it may be expedient, the superintendent acts in an official capacity in a matter involving his discretion in discharging an inmate, temporarily out on parole; hence he is not liable for damages sustained by a third person by reason of turning the inmate at large, where he did not act maliciously or corruptly.

SAME—DISCHARGE—POWERS OF SUPERINTENDENT—STATUTORY PROVISIONS. The fact that Rem. & Bal. Code, § 5962, provides for the discharge of inmates of the hospital upon application of relatives, etc., by an order of court, after notice to the superintendent and a hearing with provisions for the return of the inmate in case he is not properly cared for or is dangerous, does not negative the superintendent's power to exercise discretion other than in relation to an absolute discharge; since the above section has nothing to do with the superintendent's discharge on his own motion.

SAME—DISCHARGE—ABSOLUTE OR CONDITIONAL. The power of the superintendent of the state insane hospital, given by Rem. & Bal. Code, § 5967, to discharge inmates includes the power to discharge them conditionally or upon parole.

SAME—DISCHARGE FROM HOSPITAL—LIABILITY OF SUPERINTENDENT—NEGLIGENCE. The fact that the superintendent acted negligently in discharging an inmate conditionally, and did not immediately take steps to send a guard for his return, upon hearing that he was giving some trouble (his relatives agreeing to send him East next morning) does not affect the nonliability of the superintendent to answer in damages to one who was injured by an insane attack of the discharged inmate (FULLERTON, J., dissenting).

SAME—CUSTODIAN—DUTIES AND LIABILITIES—TORTS OF INSANE PERSON—EVIDENCE—SUFFICIENCY. The husband of a woman who had obtained the discharge and custody of her insane son from the state insane hospital is not liable in damages to one who sustained injuries in an insane attack by the son, where he had nothing to do with securing the discharge, and it appears from the evidence that the son had been afflicted with a mild form of insanity, and had

¹Reported in 145 Pac. 423.

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Citations of Counsel.

never been considered dangerous, and after two weeks in the asylum was released on parole as greatly improved, and upon learning that the son was giving trouble by annoying attentions and letters to a young lady, and upon complaint by police officers, in order to avoid the son's recommitment, he agreed with the officers to send him East to relatives the next morning, and provided him with money therefor, with which he followed the girl, and made an attack upon being prevented from seeing her; since, under all the circumstances, he could not, as a matter of law, be reasonably expected to anticipate the consequences which followed (FULLERTON, CHADWICK, and MAIN, JJ., dissenting).

SAME—QUESTION FOR JURY. In such a case, the liability of the mother is a question for the jury, where it further appears that, in order to get her son released from the hospital, she signed an agreement to assume all responsibility for his actions, knowing that he was not fully recovered, and agreed to care for him, and was told that he was writing letters to a young lady with such frequency as to cause her great anxiety; the question whether she performed her voluntary assumed duty with reasonable care, and should have anticipated that he might become dangerous, being questions of fact for the jury (PARKER, MOUNT, and MORRIS, JJ., dissenting).

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 23, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed as to appellant Mrs. Littlejohn and reversed as to the others.

E. R. York, for appellants Littlejohn, contended, among other things, that liability for negligence arises only when defendants owe a duty arising from contract or otherwise to the injured party. *Kahl v. Love*, 37 N. J. L. 5; *Western Union Tel. Co. v. Shriver*, 141 Fed. 538, 4 L. R. A. (N. S.) 678; *Akers v. Chicago, St. P. & M. R. Co.*, 58 Minn. 540, 60 N. W. 669; *Baker v. Morris*, 33 Kan. 580, 7 Pac. 267. Under the statute of frauds, defendants would not be liable for the "mis-carriage" or "misdoings" of another unless the contract was in writing. 8 Am. & Eng. Ency. Law (1st ed.), 675; 2 Bouvier, Law Dictionary, 240; 2 Abbott, Law Dictionary, 110; *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913 D. 849; *Smith v. Fah*, 54

Ky. (15 B. Mon.) 443; *Richardson v. Crandall*, 48 N. Y. 348. There was no privity of contract. *Parlin v. Brandenburg*, 2 N. D. 473, 52 N. W. 405; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *State v. St. Louis & S. F. R. Co.*, 125 Mo. 596, 28 S. W. 1074; *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106; *Puget Sound Brick etc. Co. v. School Dist. No. 73*, 12 Wash. 118, 40 Pac. 608; *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *National Bank v. Grand Lodge*, 98 U. S. 123; *Anderson v. Fitzgerald*, 21 Fed. 294. The primary liability of Calhoun continued after the parole of Pence. *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81; *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 42 L. R. A. (N. S.) 1005; *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 42 L. R. A. (N. S.) 1000; *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 721; *McPhee v. United States Fidelity & Guaranty Co.*, 52 Wash. 154, 100 Pac. 174, 132 Am. St. 958, 21 L. R. A. (N. S.) 535. It was error to refuse the requested instructions that the law presumes that public officers are presumed to have done their duty and that the Littlejohns were entitled to rely upon the parole. *Van Deusen v. Newcomer*, 40 Mich. 90, 136; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 31; *Porter v. Haight*, 45 Cal. 631; *Service v. Shoneman*, 196 Pa. St. 63, 46 Atl. 292, 79 Am. St. 689; 12 Dec. Digest, Malicious Prosecution, §§ 21, 25.

W. V. Tanner, *Stephen V. Carey*, and *J. T. S. Lyle*, for appellant Calhoun.

Bates, *Peer & Peterson*, for respondent. The doctrine of the pardon cases cited by counsel is not at all applicable, as the rule is that when a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, and where it directs the performance of certain things in a particular manner, it forbids by implication

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every other manner of performance. 19 Cyc. 23; 36 Cyc. 1122; *Scott v. Ford*, 52 Ore. 288, 97 Pac. 99. The custom of paroling patients as practiced by the superintendent being plainly contrary to the statute could afford no protection, under the well established rule that a practice on the part of officers at variance with the plain meaning of the law will not be sustained as a construction of the law. 12 Cyc. 1057; *Knox County v. Goggin*, 105 Mo. 182, 16 S. W. 684; *Walters v. Seuf*, 115 Mo. 524, 22 S. W. 511; *Walters v. Brooks*, 115 Mo. 534, 22 S. W. 514; *Bailey v. Rolfe*, 16 N. H. 247. Even though a public officer, the responsibility of appellant Calhoun seems to be thoroughly established by the authorities. *Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44; *Amy v. Supervisors*, 11 Wall. 136; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826. The action of Dr. Calhoun in paroling Pence was beyond his jurisdiction and power, and that he is liable for all damages flowing therefrom is universally held. 29 Cyc. 1441; *Hover v. Barkhoof*, 44 N. Y. 113; *Bennett v. Whitney*, 94 N. Y. 302; *Worsham v. Votgsberger* (Tex. Civ. App.), 129 S. W. 157.

PARKER, J.—The plaintiff seeks recovery of damages from the defendants for personal injuries which he claims resulted to him from the negligence of the defendants in failing to properly restrain and care for one O. W. Pence, an insane person. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

On June 7, 1912, O. W. Pence was adjudged insane by the superior court for Pierce county, and committed to the Western Washington hospital for the insane. The appellant Dr. A. P. Calhoun was then the superintendent of the hospital. Dr. F. P. Wilt was assistant physician of the hospital, and directly in charge of Pence while he was in the hospital as a patient. Pence was then 30 years old. He first showed signs of insanity about ten days previous to his commitment

to the hospital. He never had suicidal or homicidal tendencies. He imagined that people—especially detectives—were after him, to do him injury. Physically, he is in a normal state of health. One of the examining physicians in the insanity proceedings, testifying upon the trial of this case, described Pence's condition as follows:

"Am physician and surgeon. Was one of the physicians appointed to act as a commission to examine O. W. Pence. Recall the examination tolerably well. Remember his condition at that time. Pence to all appearances was normal, in a normal condition; that is, without getting his hobby, he could not have been convicted before any jury of insanity. There was no history of filth, dirt, as to his clothing; in fact, he was careful about his clothing; no suicidal mania; no tendency to injure others and no history at all that would lead to a conviction of insanity. What I convicted him on was delusion and the delusion was of a religious nature. My recollection now is that he was religious altogether and that he had hallucinations I think, hallucinations of hearing, he heard imaginary voices; I think it was on that point alone almost that I found him insane.

"I did not consider him dangerous; if he was given a rest of a few days he would rapidly recover.

"He had delusions that detectives were after him. That people were trying to get at him to do him harm. We sent him to the asylum for rest. If we had a place of detention outside of the asylum, I should not have sent him to the asylum."

Pence is a son of appellant Mrs. Littlejohn, who lives in Tacoma with her husband, A. J. Littlejohn. After Pence was committed to the hospital for the insane, his mother visited him several times. His condition while in the hospital was one of apparent rapid improvement, and, after remaining there a little over two weeks, on June 24, Dr. Wilt, acting for the superintendent of the hospital, permitted Mrs. Littlejohn to take Pence home, though he was not discharged as cured. At that time, she signed the usual writing required of those taking patients from the hospital, reading as follows:

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"This is to certify that I have taken O. W. Pence on parole from Western Hospital for Insane; knowing that he is not fully recovered, I assume all responsibility for his actions while in my charge, and agree to care for him and return him to the hospital at my own expense if it becomes necessary. I further agree to write the superintendent, informing him of the condition of the patient at intervals designated by him during the life of the parole.

"(Signed) Mrs. A. J. Littlejohn,
"Address 3704 6th Ave., Tacoma, Wash."

Nothing further occurred coming to the notice of Mr. or Mrs. Littlejohn, indicating that Pence's condition was other than one of continuous improvement, until the evening of July 4 or 5, some ten days after he was brought home, when two police officers of the city of Tacoma, Recob and Brown, visited the Littlejohn home and talked to Mr. and Mrs. Littlejohn about Pence. All the information then conveyed to either Mr. or Mrs. Littlejohn relative to the actions of Pence then complained of by the policemen is such as may be gathered from the testimony of Recob, as follows:

"I have lived in the city of Tacoma eight years. Have been a member of the Tacoma Police Department seven years. My attention was called to the conduct of one Pence about the fourth of July, 1912. Mr. Timmins, manager of the Pantages Theatre in Tacoma, called at the police station. He was accompanied by the manager of a play on that week at the theater. They had some letters that had been written to a girl in one of the acts at the theatre. We looked the letters over. They were written by Pence and gave his name and address as Sixth Avenue. We looked up the address and found it was the Littlejohn residence.

"We (Mr. Brown and myself) went to the Pantages Theatre that night. Pence was supposed to be in the front row and we went to observe his actions. He did not come that night, and we went to the Littlejohn house to see him. At that time I did not know that Pence had been an inmate of the asylum. We went to the Littlejohn house to investigate, to see why he was writing such letters. We had talked with the manager and the girl. She was greatly excited.

Mr. Brown went with me. It was about 9:30 in the evening. Brown knocked at the door and Mrs. Littlejohn answered from the window upstairs. Brown said he would like to talk with Pence. She asked 'what about?' Brown said, 'I would like to talk with him.' She came to the door and talked for a minute, and then said she would call Mr. Littlejohn. She went back upstairs and Littlejohn came down. We stood in the reception hall and talked with Mr. Littlejohn. I told him there had been letters received at the Pantages Theatre addressed from his number, and we came out to have a talk with Pence. Littlejohn said: 'Now Pence has just been in from the asylum. I don't like to have you talk with him; it might make him worse.' He would not let us talk with him, and we told him there would have to be something done . . . After Littlejohn refused to let us have a talk with Pence, we told him something would have to be done and he said: 'Well now I have got everything arranged for him to leave tomorrow . . . I will send him east.' . . . I don't remember the place he said, somewhere in the east, to his relatives, or would send him back to the asylum.

"We told him he must not let him go to Portland on account of the girl. She went over there. The girl was awful excited over the letters, and I told Littlejohn to buy a ticket himself and send him east rather than give him money. I said he was liable to go down there (to Portland) and kill someone. He said he was going to send him east. At that time I talked to Littlejohn about the letters and what Pence had been doing. There was no sense to the letters. A right-minded person would not write such letters. He wanted the girl to marry him. Wanted her to meet him over in the Fireman's Park. It was just a lot of foolishness. I had known Mr. Littlejohn by sight for the last eight years. I told Littlejohn if he would do as he said I would leave Pence with him, with the understanding that he would be sent away the next day. I told him to buy the ticket himself and start him east. If he gave him the money he would go to Portland. We didn't insist on seeing Pence that night because we relied on Littlejohn doing as he said. The next I heard of Pence Mr. Timmins told me he had gone to Portland and shot Mr. Emery. This was four or five nights after we were out at Littlejohn's. . . .

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"I saw part of the letters written by Pence to the girl, but did not see any letters written by the girl to Pence . . . The letters did not contain any threats or vile language. They were merely the letters of a person having some admiration or pretence of love for the girl, asking her to marry him and expressing affection for her. I had never seen Pence up to that time . . . So far as I know the police department never communicated with the asylum authorities concerning Pence."

Brown's testimony relative to the visit to Littlejohn's home is in harmony with that of Recob above quoted, though it does not go so much into details. Neither Mr. or Mrs. Littlejohn ever saw any of the letters claimed by the policemen to have been written by Pence to the actress, and they had no knowledge of the contents or nature of those letters except as communicated to them by the policemen. No other acts of Pence were complained of or reported to them. On the evening of the visit of the policemen to the Littlejohn home, Pence had been home during the whole evening, and was not at the theater where the policemen went expecting to find him. Mrs. Littlejohn, on the following day, reported by telephone to the hospital, talking to Dr. Wilt, the incident of the policemen coming to their home and complaining of Pence's action in writing the letters. Just what Mrs. Littlejohn told Dr. Wilt of the hospital over the telephone concerning the visit of the policemen is not very clear. Dr. Wilt testified as to what she then told him as follows:

"I talked with Mrs. Littlejohn over the telephone. If I remember right she called me. She mentioned that the police had been to the house the evening before. She did not say why they had been there any more than for the purpose of stopping Mr. Pence's actions. At the time of the conversation Dr. Calhoun happened to be in the office where the telephone is located. I asked him what we should do, and he thought it advisable to send in a guard if he (Pence) was causing any trouble. She (Mrs. Littlejohn) said she would send him east the next morning. That was satisfactory to us. If I remember rightly I told her we would send a

guard. The reason we did not send a guard for him was that she promised to send Pence east. As to imposing conditions as to the manner in which he should be sent east, I do not know of any special arrangements by which he was to be sent east. There was nothing said about that at the time that I remember. Dr. Calhoun was in the office at the time and I talked to him as to what should be done. This was not the first time Mrs. Littlejohn had talked to me about Pence after his release. As I remember she telephoned to me several times, and told me how well he was getting along."

A day or two later, on July 7, Pence went away, as Mr. and Mrs. Littlejohn supposed, to his relatives in Missouri, as they had planned, and had furnished him money for so doing. They evidently honestly believed that he went to Seattle, with a view of going east over the Great Northern, and not to the south through Portland. However, that was the last seen or heard of him by Mr. or Mrs. Littlejohn until after his shooting respondent in Portland on July 9, resulting in the injuries of which respondent here complains, and for which he seeks recovery from appellants. What occurred at the time of that shooting may be related in the language of respondent's testimony, as follows:

"On the evening of the 9th of July, Tuesday evening I believe it was, during the latter part of the second performance, one of the stage hands came to me and reported a gentleman in the hall to see one of the lady performers and almost the same time I think Miss Callie Lowe made the exclamation, 'There is the man that I am afraid of.' I walked out to the hall which is on the same level with the stage and the entrance from the alley to the stage and standing in the hall was a man. I walked right close up to him, possibly a foot and a half, as I would speak to anybody and I asked who he wished to see and he said, 'I am O. W. Pence, and I am engaged to be married to Callie Lowe, I would like to speak to her.' While he was speaking, I noticed on the lower part of his vest he had a badge, an officer's badge, deputy sheriff, and it was turned upside down so I couldn't read it and as he finished speaking, I reached over and turned over the badge so I could read the letters. I says, 'What kind of a badge is

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that?" He said, "What have you got to say about it?" And he pulled his gun out and commenced firing and struck me."

In view of the conclusions we have reached, especially upon the question of the negligence of Littlejohn and wife here complained of, we have related the facts in the most favorable light possible in aid of respondent's contentions, though the facts, as testified to by the policemen are, in some details, contradicted by the testimony of Mr. and Mrs. Littlejohn. Otherwise, the facts as related above are undisputed. Nor does the record contain any other facts, as we view it, lending additional aid to the respondent in the contention made by his counsel.

Counsel for appellant Dr. Calhoun contend that the trial court erred in declining to decide the cause in his favor, as a matter of law, upon their motions for a directed verdict, made at the close of the plaintiff's evidence and also at the close of all of the evidence. The principal ground upon which this contention is rested is, that appellant Dr. Calhoun, being the superintendent in charge of the hospital, performing an official act involving the exercise of his discretion as such, in allowing Pence to leave the hospital with his mother, and in allowing him to remain away, no liability by an action for damages can be imposed upon Dr. Calhoun. We shall, for the purpose of argument, treat all actions of Dr. Wilt, the assistant physician, as those of Dr. Calhoun. The only provision of our statute relating to the discharge or parole of patients by the superintendent of the hospital of his own motion is that found in Rem. & Bal. Code, § 5967 (P. C. 247 § 53), reading as follows:

"Any patient may be discharged from the hospital when, in the judgment of the superintendent, it may be expedient."

This, in fact, is the only provision of our statutes relating to the subject of the discharge or parole of patients by the superintendent, at the instance of any one, except as provid-

ed by Rem. & Bal. Code, § 5962 (P. C. 247 § 43), reading as follows:

"The relatives or friends of an inmate of the hospital for the insane may receive such inmate therefrom on their giving a bond or other satisfactory evidence to the superior judge issuing the commitment, that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person. If such satisfactory evidence appear to the judge, he may issue an order, directed to the superintendent of the hospital for the insane, for the removal of such person. If, after such removal, it is brought to the knowledge of the judge, by verified statement, that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, he may order such person returned to the hospital."

It is manifest that the discharge of a patient from the hospital by the superintendent of his own motion involves the exercise of discretion upon his part. It is insisted, however, by counsel for respondent, that such discretion of the superintendent pertains only to the question of absolute discharge of a patient, and that he has no other discretionary power, especially none as to the parole or conditional discharge of a patient. It is argued that the provisions of § 5962 above quoted negative the idea of the superintendent's exercising discretion other than in relation to the absolute discharge of a patient. We are unable to agree with this view. It is manifest that the method of relatives or friends acquiring possession of a patient provided for in § 5962 is only a procedure which may be instituted at the instance of such friends or relatives, and has nothing whatever to do with the discretion of the superintendent in discharging patients conditionally or otherwise. Whatever is done under that section may be done even against the judgment or will of the superintendent, and has nothing to do with the performance of any duty upon his part other than to obey the order of court which may be made in pursuance of proceeding under

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that section. The diligence of learned counsel for respondent has not brought to our attention any direct authority throwing any light upon this contention, nor has any such authority come to our notice except the law relating to the pardoning power, which, by way of analogy, furnishes some aid to the solution of this problem.

"The power to pardon is generally held to include the power to mitigate or commute sentences, the theory being that the greater power includes the less." 24 Am. & Eng. Ency. Law (2d ed.), p. 567.

See, also, 29 Cyc. 1570; *Fuller v. State*, 122 Ala. 32, 26 South. 146, 82 Am. St. 17.

We are of the opinion that the power of absolute discharge of patients from the hospital includes the power to parole or conditionally discharge patients therefrom; and that all acts of the superintendent under this power involve the exercise of discretion on his part of a *quasi* judicial character.

The acts of Dr. Calhoun here complained of being official, and calling for the exercise of his discretion, the law seems to be settled beyond controversy that he cannot be called to account for any consequences flowing therefrom, in a civil action for damages instituted by a person claiming to be injured as the result of such discretionary action, in the absence of malicious or corrupt action. It is not claimed that Dr. Calhoun acted either maliciously or corruptly. Indeed, it could not be with any show of reason under the evidence. The most that can be said is that he acted mistakenly, or, for argument's sake, we may concede that he acted negligently; but, under all the authorities, such action would not render him liable in this action, since his acts were official and involved his discretion. In the text of 29 Cyc. 1444, after noticing the law touching the immunity of judicial and legislative officers from liability in an action for damages flowing from their official acts, it is said:

"In the third place are the vast number of officers not holding courts, but discharging executive and administrative

functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for a mistaken exercise of such discretion. In many of the cases on the liability of inferior judicial officers and officers discharging quasi-judicial or administrative functions, the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability. But in most cases what is said in the opinion is merely *dictum*, inasmuch as the actual decision did not recognize the liability. There are, however, a few cases which actually decide that if the act complained of has been done with corrupt motives or malice there is a liability to the person injured. On the other hand, it has been distinctly held that, if the officer whose acts are complained of keeps within his powers, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts."

In *Kendall v. Stokes*, 3 How. 87, Chief Justice Taney, speaking for the supreme court of the United States, said:

"A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs."

In *Spalding v. Vilas*, 161 U. S. 483, Justice Harlan, speaking for the United States supreme court, in a case where damages were sought in an action against the Postmaster General, claimed to have resulted from his official action, said:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be

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his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law."

In *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377, it is said:

"Discretionary power is, in its nature, independent, and to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. Discretion, to a certain extent, implies judicial functions; and when officers act in such a capacity, they are not liable to any private person for a neglect to exercise these powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and they keep within the scope of their official duties and authority."

See, also, *Porter v. Haight*, 45 Cal. 631; *Fath v. Koepfel*, 72 Wis. 289, 39 N. W. 539, 7 Am. St. 867; *Garff v. Smith*, 31 Utah 102, 86 Pac. 772, 120 Am. St. 924; *Rohn v. Osmun*, 143 Mich. 68, 106 N. W. 697, 5 L. R. A. (N. S.) 635; *Valentine v. Englewood*, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262; *Mechem, Public Officers*, § 638; *Cooley, Torts* (2d ed.), p. 447; 23 Am. & Eng. Ency. Law (2d ed.), p. 375.

We are clearly of the opinion that it must be held, as a matter of law, that Dr. Calhoun is not liable for the damages complained of in this case, upon the ground that he acted in an official capacity in a matter involving his discretion, and did not act maliciously or corruptly. Whether he would have been liable to respondent had he acted maliciously or cor-

ruptly, we do not now decide. Clearly, his acts were not attended by any such motives on his part.

Is there any sound legal basis upon which appellants Littlejohn and wife may be held liable in damages to respondent because of the unfortunate injuries resulting to him from the apparent insane act of Pence? We are constrained to hold, as a matter of law, that there is not. One is not liable for his every act that may ultimately result in wrong to another. He is only responsible for that which, in the light of experience of mankind, he should reasonably anticipate as liable to happen; not that which might barely possibly happen as the result of his act. In the text of Webb's *Pollock on Torts* (enlarged Am. ed.), on page 42, the learned author observes:

"The doctrine of 'natural and probable consequence' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

Similar observations are made in the text of *Negligence of Imposed Duties (Personal)*, p. 133, by the learned author, Justice Ray, as follows:

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"Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things.

"The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident."

This doctrine has been applied by us in *White v. Spokane & Inland Empire R. Co.*, 54 Wash. 670, 103 Pac. 1119; *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364, and other master and servant personal injury cases where there was involved a duty of the master to the servant resting upon the contract of service existing between them. In so far as the master's liability for injury to the servant is concerned, a duty, to whatever extent it exists, is owing directly to the servant. The duty here involved, if any, was that of Littlejohn and wife to respondent simply as a member of the public. Assuming, however, that that duty was of such a nature that Littlejohn and wife might become liable to some person injured by Pence, in view of the control they had over him, we are quite unable to see that Pence's homicidal act resulting in the injury to respondent was within the realm of proba-

bility, as Littlejohn and wife had a right to view his probable future actions in the light of the knowledge they possessed as to his mental condition. The above quoted observations from the works of Pollock and Ray are, of course, very general, but we cannot escape the conclusion that they nevertheless fully answer the problem here involved, as a matter of law, in favor of Littlejohn and wife. The facts they had before them pointing to the probable future actions of Pence were, that he had no homicidal tendencies; that he had developed no signs of insanity until about two weeks before he was committed to the asylum, and about four weeks before he committed this act; that his insanity was of a mild form; that he was improving mentally up until the time they were informed of his infatuation with the actress; that he was regarded by the assistant physician of the hospital, Dr. Wilt, as being harmless; that the letters written by him to the actress, as the contents of those letters were made known by the policemen to Littlejohn and wife, "did not contain any threats or vile language," but "were merely the letters of a person having some admiration or pretense of love for the girl, asking her to marry him, and expressing his affection for her." It seems clear to us this would not indicate to the ordinary mind anything more than that Pence was making himself somewhat of a nuisance to the actress, and might possibly continue to do so. It does not contain the suggestion that he might attempt to do any one physical harm, in view of the fact that he had never developed any tendencies to do any one physical harm up to the time of shooting respondent. It is true, one of the policemen says in his testimony that he told Littlejohn that Pence was liable to go to Portland "and kill some one," but this was only an opinion expressed on the part of the policeman, and not warranted by the facts then communicated by him to Littlejohn except as an opinion of a bare possibility. What Littlejohn and wife then learned as to what Pence was actually doing was the thing to guide them in their actions. We are of the opinion that it must be

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decided, as a matter of law, from the undisputed facts here shown, that Littlejohn and wife were, as reasonable persons, not bound to anticipate the unfortunate occurrence upon which it is now sought to render them liable in damages. The diligence of learned counsel for respondent has not brought to light a single decision of any court holding a person liable for negligence growing out of his want of care and restraint over an insane person. A remark made by the United States court of appeals of the eighth circuit, in their syllabus to *Western Union Tel. Co. v. Schriver*, 141 Fed. 539, seems quite appropriate here, where they say:

"The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists."

We are not prepared to say that a private person having the legal custody and control of a violently insane person with homicidal tendencies could not, under any circumstances, be rendered liable for damages caused by such a person, resulting from want of proper restraint on the part of the person having him so in charge, yet no decision of a court involving even such an extreme case has been brought to our notice. We conclude that the judgment of the learned trial court should be reversed, and the cause dismissed upon the ground that there is no legal liability to answer to respondent in damages, resting upon either Dr. Calhoun or the Littlejohns.

MOUNT and MORRIS, JJ., concur.

GOSE, J. (concurring in part)—I concur in the view that neither Dr. Calhoun nor Andrew J. Littlejohn is liable in damages to respondent. I think the statute clothed Dr. Calhoun with discretionary powers. The appellant husband was not instrumental in getting Pence out of the hospital. He had no knowledge of his removal from the hospital until he found him in his home. I think the case stands upon a different footing as to Mrs. Littlejohn. In order to get Pence released from the hospital, she signed an agreement to

"assume all responsibility for his actions" while in her charge, "knowing that he is not fully recovered." She agreed "to care for him." She knew that Pence had been adjudged insane a short time before she secured his release. She was told that he was writing letters to a young lady with such frequency as to cause her great anxiety. She was dealing with an insane man who had only partially recovered his reason. I think, upon the facts stated, it was for the jury to determine whether, in the exercise of reasonable care, she should have anticipated that Pence might become dangerous at any moment. She had voluntarily assumed a duty. Did she exercise reasonable care in performing that duty? The jury and the trial court have said no. I do not think that we should hold that the verdict is without sufficient evidentiary basis. To this extent I dissent.

CROW, C. J., and ELLIS, J., concur with GOSE, J.

CHADWICK and MAIN, JJ. (concurring in part)—We think that Mr. and Mrs. Littlejohn are liable to answer in damages. We agree that Dr. Calhoun is not liable.

FULLERTON, J. (dissenting)—I am unable to concur in the conclusion reached by the majority. In my opinion, the evidence justified submitting the question of liability as against all of the defendants. As to the superintendent of the asylum, it may be that he acted within his authority when he granted the parole to Pence in the first instance. But I think he was grossly negligent in not immediately ordering Pence to be brought back to his place of confinement when he learned that he had become infatuated with the young woman, and had pursued his attentions towards her with such vehemence as to put the woman in fear, and to cause those surrounding her to believe that it was a proper matter to be brought to the notice of the police. It is common knowledge that, when a man of weak or unsound mind conceives an infatuation for a woman, he commonly at once becomes, particularly if his attentions are shunned and avoided,

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highly dangerous, not only to the object of his infatuation, but to those whom he believes stand in the way of his approach to her. Dr. Calhoun must be held to have known of this general propensity. He was the person selected by the state to control the custody and actions of Pence, and the person on whom the state looked to see that he did not become a menace to the public. When, therefore, he was informed of this new form of dementia in his patient, and failed to take adequate action to prevent harm therefrom, it was, in my opinion, for the jury to say whether he performed his duty with that degree of care and prudence the circumstances imposed upon him. I concede that he has a large measure of discretion in the care and control of the unfortunate committed to his care, but this does not absolve him from all prudence. Carried to its utmost limit, the doctrine of the majority would justify him in turning the entire innacy of the asylum loose upon the unsuspecting public. But it is said there are no precedents for such a liability. I think there are analogous cases. The parents of a child are not, at common law, usually liable for the torts of their minor children, but they are so if they know of their propensity for mischief, and do not use a reasonable degree of prudence to restrain them. The keeper of a vicious animal is not commonly liable for injuries caused by it, but is so if he knows of its vicious nature and neglects to use reasonable care to prevent its doing mischief. A poor unfortunate with mind destroyed is less responsible than even these, and I cannot conceive of any principle of law which would hold the keeper of one responsible and exempt the keeper of the other. Again, it is said that the rule I conceive should prevail would tend to the injury of the person confined, as the keeper of the asylum would hesitate to discharge a person committed to his charge even after he felt that a cure had been effected, because of his liability to answer in case of a mistake. But it is a sufficient answer to this to say that

our statute provides for a judicial inquiry in cases of doubt, and immunity from liability for a wrongful discharge of a patient can be had by pursuing that method.

As to Andrew J. Littlejohn, I think him liable on the principle that it was negligence on his part to turn Pence loose with means in his pocket to pursue the girl to a neighboring city, particularly after warning had been given him of the young man's infatuation and of his liability to pursue such a course. Common prudence requires that persons of unsound and defective minds be guarded. The most optimistic must recognize this fact if they do no more than but glance at the great public institutions the state supports and maintains for their control. Ordinary prudence, it seems to me, would have dictated that Mr. Littlejohn, since he had assumed to assist in protecting the public from this unfortunate person, should have placed him in the charge of some person to look out for him on his journey to his intended destination, or, at least, should have himself purchased his ticket and seen that he was safely on his way before leaving him free to exercise the bent of his disordered mind.

Mrs. Littlejohn, in my opinion, is the least blamable of any of the appellants. Pence was her son. For him she had the instinctive, primal love; the love that causes a mother to make sacrifices for her offspring when its return is ingratitude, contumely, and hate; the love that survives and gives rise to hope when all the world condemns. But I think it was for the jury to say whether even she, in this instance, exercised that degree of care which was incumbent upon a mother. She could but know that her son was irresponsible, that his dementia had taken a dangerous turn, and that he was liable because thereof, if left unrestrained, to inflict injury on some individual unaware of his infirmity.

I conclude, therefore, that the question of the defendants' negligence was for the jury, and that, since they found negligence, the judgment should be affirmed.

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[No. 11996. Department One. January 8, 1915.]

E. N. FITCH, *Appellant*, v. HENRY GOETJEN *et al.*,*Respondents*.¹

CHATTEL MORTGAGES—FORECLOSURE BEFORE MATURITY OF DEBT—REASONABLE CAUSE. Reasonable cause to believe that mortgaged horses and farm machinery will be lost or removed, justifying immediate action for the recovery of the debt under the provisions of Rem. & Bal. Code, § 1111, is not shown by the fact that the mortgagee believed that the property might be stolen and removed by members of a family in the neighborhood, his suspicions being based only upon gossip, rumor, and hearsay and general reputation of the community for horse and cattle stealing, where it appears that the mortgagee, at the time of the execution of the mortgage, had knowledge of the reputation of the neighborhood and of the intention of the mortgagors to pasture the horses upon the neighborhood range; that there had been no change in conditions and reputation of the neighborhood as to horse and cattle stealing; and that the mortgagors had done nothing themselves to impair the safety of the property at any time (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered May 7, 1914, upon findings in favor of the defendants, denying plaintiff's costs, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Smith & Gresham, for appellant.

Neal & Neal, for respondents.

PARKER, J.—The plaintiff, E. N. Fitch, commenced this action in the superior court for Okanogan county to recover upon a promissory note and foreclose a chattel mortgage given by the defendants Henry and Charles Goetjen to secure the same, before maturity of the debt so evidenced and secured. The plaintiff rests his claimed right to commence the action before maturity of the debt, upon the ground of his alleged reasonable cause to believe that the mortgaged

¹Reported in 145 Pac. 447.

property would be removed by theft from the jurisdiction of the court, which gave him the right to commence the action before maturity of the debt under Rem. & Bal. Code, § 1111 (P. C. § 349 § 25), which reads as follows:

“Where the debt is not due for which the mortgage is given, and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he shall have the right to an immediate action in the superior court of the county having jurisdiction where the property is situated, for the recovery of his debt, and the court may make any order it may deem fit, in order to secure said property so as to make the same available for the satisfaction of said debt.”

There is remaining of this controversy only the question of plaintiff's claim of his right to judgment for costs and attorney's fees in the superior court, the full amount of the principal and interest having been duly tendered by the defendants at the time of the maturity of the debt, and thereafter kept good by deposit in court.

Trial before the court resulted in findings and judgment awarding the plaintiff, as a matter of course, the amount of the tender deposited in court, but denying to the plaintiff judgment for costs incurred in the superior court. From this disposition of the cause, the plaintiff has appealed to this court.

The evidence is not here, the cause being before us for determination upon the findings of fact, which are very voluminous. The controlling facts to be gathered therefrom may be summarized as follows:

On September 9, 1912, respondents executed and delivered to appellant their promissory note for the sum of \$650 payable one year from date with twelve per cent interest, at the Okanogan State Bank, Riverside, Okanogan county. To secure the debt thus evidenced, respondents, at the same time, executed and delivered to appellant a chattel mortgage upon certain horses and farm machinery belonging to them. On

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August 2, 1913, over a month before the maturity of the debt, appellant commenced this action in the superior court for Okanogan county, alleging, in addition to facts constituting the usual cause of action in foreclosure, facts upon which he rested his right to commence foreclosure proceedings before the maturity of the debt. On August 14, 1913, appellant procured from the superior court an order authorizing the seizure of the mortgaged property by the sheriff of Okanogan county and the holding of the same pending the foreclosure, which was accordingly done. The property was thereafter returned to respondents by order of the court upon their giving bond therefor. Appellant's claim of right to commence the foreclosure before the maturity of the debt is based upon his alleged reasonable belief that the mortgaged horses would be stolen and taken out of the country, his alleged belief being that the property might be so stolen and removed by members of a family of the neighborhood by the name of Haley. The principal facts bearing upon the cause of such alleged belief were found by the trial court as follows:

"At the time of the execution of said instruments, the note and mortgage herein referred to, the defendants had arrived at the vicinity of Tunk Creek Valley, near the Okanogan river, and were then engaged in hay harvesting for one Dougal McAllister, about five miles from plaintiff's ranch, on said Tunk creek; that defendants' prospective destination, when leaving the state of Oregon, was British Columbia; that upon the inducements and persuasions of said plaintiff, said defendants leased plaintiff's said ranch in the Tunk Creek Valley, and purchased from said plaintiff, certain hay, farm machinery and other personal property, for which the note herein set out was executed, and then and there leased said plaintiff's ranch for the term of one year from September 9, 1912, and immediately thereafter moved to said leased premises, and took with them the personal property described in the mortgage set out in the complaint herein. . . . as an inducement and consideration to defendants for leasing said premises, plaintiff stated to defendants, that the range

surrounding his ranch was good, and that the Tunk Creek Valley was the best horse pasture in the country, that both the range and water were good and convenient and easy of access to the stock and horses, which defendants had with them, and a part of which they thereafter mortgaged to said plaintiff as security for the payment of their promissory note executed for the purchase price of the personal property hereinbefore referred to. . . . Immediately after the execution of said note and mortgage, defendants moved to plaintiff's ranch and took with them the horses described in said mortgage, together with other horses and property not included therein, and turned said horses onto the range of the commons, in the vicinity of plaintiff's ranch; that plaintiff was present at the time, not having then removed from his said ranch, and had personal knowledge of the fact that said mortgaged horses were being turned out to range on the commons in that vicinity, and made no objections whatever to such act on the part of defendants, in turning said horses onto the public range, and did not then, and had not therefore, in any manner whatever, informed or advised defendants that there was or would be any danger whatever of said horses being stolen or taken away by thieves, or otherwise. . . . said plaintiff then and there well knew that it was the intention of said defendants to permit said horses to range on the commons in the vicinity of said ranch, except during the winter season, when the same would require feed, and made no objection whatever to such intended acts on the part of defendants, and that said horses did in fact continue to range on the commons, except during the winter season. . . . in the spring of 1913 again turned out upon the commons in that vicinity. That said horses ranged thereabouts and within a radius of from two to three miles from said premises, and watered almost the entire time in Tunk creek, in the vicinity of plaintiff's said ranch; that plaintiff visited said ranch at various times after the execution of said note and mortgage and saw said stock, and was well acquainted with the conditions surrounding the same, and did not, at any time, make any complaint to defendants, or advise them in any manner whatever that said stock was in any danger whatever from thieves . . . That during all the times since the execution of said mortgage, said defendants properly cared for, looked after said mortgaged property,

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and caused the same to range within the immediate vicinity of said premises. . . . After the execution of said note and mortgage and lease, the defendants also leased what had for a long time been known as the Haley ranch . . . After said Haley premises were leased by said defendants, they, the defendants, were necessarily upon and at the Haley ranch for the purpose of cultivating and harvesting the crops thereon, and for the purpose of irrigating a portion thereof during the irrigation season, and that defendant, Henry Goetjen, spent and continued to spend a portion of his time at the Haley place, when not engaged in farming or looking after their crops thereon. . . . That after said defendants had moved to said plaintiff's premises, they were advised and informed by plaintiff, that the Haleys had, prior thereto, borne rather a bad reputation for horse and cattle stealing, but that they were better than some of the people who talked about them, and that they were good neighbors, and plaintiff did not, at such time, or at all, advise, state, or indicate to defendants, that there would be any danger of losing any of said horses by reason of their being permitted to range on the commons in the vicinity of said Haleys."

Other findings were made reflecting upon the character and reputation of the Haleys and referring to respondents' association with them, but not otherwise reflecting upon the character or reputation of respondents. The trial court's view of the grounds of appellant's suspicion, is summarized in its findings to the effect that appellant's suspicions were based upon gossip, rumor, and hearsay, and the general reputation of the community for horse and cattle stealing, the court finding, however, that such reputation was well known to the appellant at the time of the execution of the note and mortgage and long prior thereto, but was unknown to respondents at and prior to the execution of the note and mortgage. This reputation of the neighborhood, however, apparently had undergone no change during all this time. Respondents have never done anything or failed in their duty in any respect so as to forfeit their right to hold possession of and use the property until the maturity of the debt.

Other findings, which we regard more as conclusions than findings of specific facts, are to the effect that, at the time of the commencement of this action, appellant honestly believed that he would lose his debt by removal of the property, should he delay action until the maturity of the note; yet the court finds "that the plaintiff, without sufficient cause or excuse, prior to the maturity of the note and mortgage involved in this action, caused the sheriff of Okanogan county, under the order of this court, to dispossess the defendants of the possession, use and enjoyment of the work horses described in said mortgage."

There are many more detailed facts set forth in these voluminous findings, but we think the foregoing is a sufficient summary of the facts controlling the rights of the parties here involved.

In view of the appellant's knowledge of the reputation of the neighborhood for horse and cattle stealing; his knowledge of respondents' intention to allow the horses to go upon the range of the neighborhood in compliance with the apparent usual custom of the country; the apparent lack of any change in conditions and reputation of the neighborhood as to horse and cattle stealing; the fact that respondents did nothing themselves to impair the safety of the property at any time; and the fact that respondents' association with the Haleys seems to be the only new cause for appellant's suspicions; we are of the opinion that the learned trial court correctly concluded that appellant did not have reasonable cause to believe that the mortgaged property would become lost as his security, at the time he commenced this action, and that he therefore commenced it prematurely.

Counsel for appellant invoked the general rule as announced by some courts under statutory or chattel mortgage provisions similar to our statute, that a mortgagee's right to commence foreclosure and cause the mortgaged property to be seized prior to the maturity of the debt depends only upon the mortgagee's good faith and his acting upon probable

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cause, and not upon the actual existence of danger of loss of the property as his security.

The Illinois supreme court in *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151, entertained this view in considering a chattel mortgage which by its terms permitted the mortgagee to so proceed prior to the maturity of the debt secured, at any time he should "feel himself unsafe or insecure."

In *Woods v. Gaar, Scott & Co.*, 93 Mich. 143, 53 N. W. 14, dealing with a chattel mortgage provision almost exactly of the same language as that noticed in *Roy v. Goings*, the Michigan court reached the same conclusion. This view, however, is apparently out of harmony with that of the Nebraska court announced in *Newlean v. Olson*, 22 Neb. 717, 36 N. W. 155, 3 Am. St. 286, where, considering a chattel mortgage provision reading, "If the mortgagee shall at any time feel unsafe or insecure they may seize and sell," the court said:

"To justify the mortgagee, . . . in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit, or has committed, some act which tends to impair the security; and unless such facts exist the right does not become operative."

This view was adhered to in *Case Plow Works v. Marr*, 33 Neb. 215, 49 N. W. 1119. However, we shall not attempt at this time to determine which of these views we would follow, but content ourselves with simply expressing the opinion that the facts in this case, as disclosed by the findings, warranted the learned trial court in concluding that appellant acted without reasonable cause in commencing his action and causing seizure of the property before maturity of the debt; from which, together with the fact of the tender of full amount of the principal and interest due on the note at the time of its maturity by respondents, it results that appellant is not entitled to his costs in the foreclosure action.

Apparently this court has had occasion to deal with the question of the commencement of foreclosure and seizure of chattel mortgaged property before maturity of the debt secured thereby, in but one instance—that of *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392. While the plaintiff's claimed right to so act before maturity of the debt was there sustained, it is manifest that the defendants were themselves responsible for the danger which threatened the mortgaged property. Such is not the case here.

We conclude that the judgment must be affirmed. It is so ordered.

Crow, C. J., Gose, and Morris, JJ., concur.

CHADWICK, J. (dissenting)—I dissent from the judgment of the court. Appellant had reasonable cause to believe that the mortgaged property would be destroyed, lost, or removed, if left in the keeping of the mortgagor. Whatever may have been the character of the respondents at the time the mortgage was made, the record and findings of the court make it certain that at least one of the respondents was keeping company with people of ill-repute, who were suspected of "rustling" stock. Appellant had been told by one Guyer that Charles Haley, a reputed rustler and companion of one of the respondents, was about to make a secret trip into British Columbia. The mother of respondents told appellant that she did not want to see him lose his money; that respondents were going to beat him out of it; that they intended to run the horses out of the country. Appellant sought counsel and assistance of a neighbor, Art Smith, who told him from what he had seen of the respondents that he believed that one of them was a horse thief. It further appears that appellant and Henry Goetjen had a personal altercation and that respondent in his anger told appellant that he would beat him out of the debt that was owing to him. Furthermore, the court below found that "at the time of the commencement of this action the plaintiff honestly and in good faith believed

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that he would lose his property and his debt, and that the mortgaged property would be destroyed, lost or removed if he delayed his action until the maturity of said note."

The court below and this court have assumed to try out the case as if it were our duty to find whether the property would have been in fact lost or destroyed if it had been left in the hands of the respondents. The court below found that appellant's honest belief "was based upon gossip, rumor, hearsay, and the general reputation of the community." If honest belief cannot be founded upon rumor and hearsay and general reputation, I do not know how it may be founded.

The effect of the court's decision is to deny a right to take property in satisfaction of a mortgage before the maturity of the debt, for it may be assumed that a dishonest mortgagor would swear that he did not intend to take or dispose of the property. Against such assertion, however well founded and honest the belief of the mortgagee may be, he would be powerless to avail himself of the privileges of the statute. I admit that there must be some grounds for "reasonable cause to believe." An arbitrary taking will not satisfy the law, but if there be some ground and the court can find that there was "reasonable cause to believe," a mortgagee should have his remedy.

[No. 11997. Department One. January 8, 1915.]

CONRAD JOHNSON, *Respondent*, v. H. S. MARTIN *et al.*,
Respondents, J. S. ELLIOTT *et al.*, *Appellants*.¹

PRINCIPAL AND SURETY—REMEDIES OF CREDITORS—RECOURSE OF INDEMNITY TO SURETY—SUBROGATION. Where a contractor gave a bond to secure the faithful performance of a building contract, obligating both principal and surety to pay in any event, and was required by the surety to execute to it a trust deed of certain realty to secure it against "any loss or damage" it might suffer on account of such bond, the obligee in the bond is entitled to be subrogated to the rights of the surety in the trust deed, although it may have been collateral to his own agreement with the building contractor and without his knowledge, and although the surety, by reason of its insolvency, may never be subjected to "any loss or damage" as distinguished from a "liability" on account of its undertaking.

TRUSTS—EXECUTION—WANT OF TRUSTEE—EQUITY. Equity will not permit a trust to fail for want of a trustee, but will seize upon and execute a trust when derelict between debtor and creditor when the subject-matter of the trust has been pledged by the debtor to meet a specific primary obligation of the debtor and but for which the trust would not have been created.

SUBROGATION—NATURE AND THEORY OF RIGHT—CONTRACT. Subrogation of a creditor to indemnity given by the principal debtor to a surety for the debt will not be denied on the ground of want of privity of contract, or that it does not grow out of contract, since the right of subrogation will be allowed when the equities of the case demand it.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 12, 1914, in an action to foreclose a mortgage, upon findings in favor of the mortgagor upon an issue with interveners, claiming the mortgagor's interest. Reversed.

William A. Greene, C. L. Henry, and James B. Murphy,
for appellants.

Robert C. Saunders, for respondents.

¹Reported in 145 Pac. 429.

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CHADWICK, J.—This case comes to us upon an agreed statement of facts which we shall epitomize. Respondent H. S. Martin was a contractor engaged in building houses. He and his wife, Ellen Martin, were the owners of property described as lots 1, 2 and 3, block 57, Salmon Bay Park addition to the city of Seattle. The property had been mortgaged to respondent Conrad Johnson. Thereafter Martin entered into a contract to build a dwelling house for the appellant J. S. Elliott in consideration of the sum of \$7,800, and agreed to pay for the labor and material and to deliver the premises free and clear of all liens and claims of whatsoever nature arising or growing out of his contract. Martin gave Elliott a bond in the penal sum of \$4,000, "conditioned that the said H. S. Martin would erect the said building for the said J. S. Elliott, according to the plans and specifications, and fully perform his contract in all respects." This bond was signed by the appellant The United Surety Company, as surety. To secure the surety company against any loss or damage it might suffer on account of the Elliott bond or on account of any other bond that it might thereafter enter into as surety, Martin and his wife executed a trust deed, the recitals and conditions of the deed being as follows:

"To have and to hold the same unto said grantee as joint tenants, with the right of survivorship, their successors and assigns in trust to secure The United Surety Company, a Maryland corporation, against any and all damages or loss (including a reasonable attorney's fee), which the said United Surety Company may sustain by reason of having executed or executing in the future at the request or for the benefit of Hans S. Martin any undertaking or contracts of suretyship. . . . Any and all loss or damage which the United Surety Company may suffer by reason of the undertakings or contracts of suretyship executed by it for the benefit or at the request of Hans S. Martin shall immediately become due and payable to the said company without demand, and the amount of such loss or damage shall become fixed as the amount secured by these presents, to-

gether with a reasonable sum as attorney's fees. But if all indebtedness due to United Surety Company on account of loss or damage suffered by it on account of such undertakings or contracts of suretyship shall be paid by the parties primarily responsible therefor, without demand, and said trustees or the survivor of them, their successors and assigns shall reconvey all the premises and estate derived hereunder unto the said grantors, their heirs and assigns at their request and cost. But if default be made in the payment of any of said indebtedness when due and payable or in the performance of any of the covenants herein, then, upon request of said United Surety Company or its assigns, said trustee or the survivor of them, their successors and assigns, are hereby empowered to sell for United States gold coin, the granted premises and estate or such part or parts or part at one time and part at another, and so on as in his or their discretion shall be deemed best in the manner following."

Martin entered into the performance of his contract, but defaulted, and Elliott was compelled to pay lien claims aggregating \$2,034.34. Elliott also obtained a judgment against Martin for \$403.63, for failure to complete the building according to the plans and specifications. In defending the lien claims in the superior and in the supreme court, Elliott expended by way of court costs, the sum of \$245.65, and paid attorney's fees aggregating \$750. Johnson, the mortgagee, thereafter began suit to foreclose his mortgage. The Elliotts and the receiver of the surety company, which had become insolvent, were brought in as parties, and the present controversy is waged between them and the Martins.

It is the contention of the appellants that Elliott and wife are entitled to a substitution and to be subrogated to the security held by the surety company and to the benefits of its contract as evidenced by the deed of trust.

The contention of respondent may be briefly stated. It is, that the contract between Martin and the surety com-

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pany is personal to the parties; that the condition of their contract as evidenced by the trust deed is that the property should stand in satisfaction only of "any loss or damage" suffered by the surety company on account of its undertaking; that it has suffered no "loss or damage" as distinguished from a liability; that it is now insolvent and unable to meet the penalty of the bond, and therefore no cause of action has been stated or can be stated by the Elliotts, under the rule announced in *Puget Sound Imp. Co. v. Frankfort etc. Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

These cases were all actions at law brought against an indemnitor and were correctly decided upon the theory that there was no privity, and hence could be no recovery under a strict interpretation of the obligation assumed. The indemnitor was the party defendant. No loss or damage had been suffered, or the company had terminated its contract. The suit was on the bond alone. Here the surety or its receiver is not contesting. It could not raise that issue. Its bond is conditioned for the "faithful performance of the building contract." It is not an indemnity bond. It says nothing about "loss or damage." This suit is not primarily a suit upon the trust deed. It is against Martin and the surety upon his bond, which is an undertaking on the part of Martin and the surety company to pay in any event.

The question, then, is whether a contract collateral to a direct promise to pay will inure to the benefit of the principal creditor, he having suffered a loss growing out of a breach of the original contract—a contract to build a house free of lien and according to plans and specifications. The question whether the surety company might successfully defend an action on the ground that it was insolvent and could

not suffer a "loss or damage" is not involved. We are to inquire whether equity will permit Martin to defeat his contract by resorting to a technical defense reserved by his surety, not against the Elliotts, but against him, for its own benefit, or whether it will take the parties as they were at the outset and do what they intended to do. Martin intended to build a house according to the plans and specifications and free of lien. If he did not he expected and intended that his trustee should pay the loss out of his own property. The only thing standing in the way of the due execution of the contract is a competent trustee. It is a primary rule that equity will not permit a trust to fail for the want of a trustee.

The features which distinguish the cases cited from the case at bar may be illustrated by reference to the *Ford* case. It is typical of the three cases and of the authorities cited in the several opinions. A recovery was denied upon the theory that there was no privity between the indemnitor and the party plaintiff. The contract did not extend either in law or in equity to a tort or contract creditor of the insured party. The indemnifying company was a stranger to the plaintiff in each and every case; while here there is a tie of privity between the surety company and the principal creditors, the Elliotts, in virtue of the bond and the trust deed which was given to sustain the liability assumed by the company and but for which we may assume it would not have signed the bond to answer for the default of Martin. We may further assume that the Elliotts would not have entered into a contract with the Martins if Martin had not executed the bond, and we may assume that the surety would not have engaged as a bondsman if it had not been secured. With these assumptions before us, equity will not allow the Martins to say their obligation is not good when resort to the substance of the whole transaction is necessary to keep it whole. There is nothing in the cases demanding it, nor would we, in the absence of controlling principles of law or

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equity, extend the doctrine of the cases relied on to the extent of destroying a security given by the Martins to secure their unqualified promise.

Under well settled authority, a principal creditor may subject any security held by a surety upon the principal obligation to the payment of his debt. The earliest expression of the rule which we have noted is found in *Maure v. Harrison*, cited in 1 Eq. Cas. Abr. (Eng.) 93:

"A bond creditor shall, in this court, have the benefit of all counterbonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

The more modern doctrine is well stated by the court of errors and appeals of New Jersey in the case of *Demott v. Stockton Paper Ware Mfg. Co.*, 32 N. J. Eq. 124, where it is said:

"As a general rule, where a surety or a person standing in the situation of a surety for the payment of a debt, receives security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance. And the right of the creditor is the same when the security is a mortgage, or other lien given to the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given; and to entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law or have reduced his debt to judgment."

See, also, *Brandt, Suretyship* (3d ed.), § 1419; *Vail v. Foster*, 4 N. Y. 312.

In *Hampton v. Phipps*, 108 U. S. 260, the court found a state of facts which fell within an exception to the rule, which it states as follows:

"Many sufficient maxims of the law conspire to justify the rule. To avoid circuitry and multiplicity of actions; to

prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of a contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

The same doctrine is announced in the case of *Swift & Co. v. Kortrecht*, 112 Fed. 709. In the case of *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539, the same defense was made as here, that a mortgage executed in favor of a surety was given to indemnify the surety personally and until he had suffered some loss or damage, no right of action could accrue and in no event could the creditors of defendant maintain an action when no payment had been made or loss suffered by the surety to whom the mortgage had been given as an indemnity. Both the principal and the surety had become insolvent. The court said:

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"Under well settled and recognized principles of equity it seems quite clear that the lien of the mortgage on this property is ultimately for the benefit of the holders of the original indebtedness, who, in a proper case, should be adjudged entitled to subrogation to the rights of the surety. When the surety is insolvent, as in this case, or for failure otherwise to discharge the legal obligation he had assumed, it would seem the equitable principle of subrogation could be invoked. The object and purpose of the chattel mortgage to be finally accomplished was to secure payment of the principal indebtedness by the mortgagor, who was primarily liable therefor. It was his obligation, and to secure its satisfaction out of his own means as the one on whom the obligation first rested, he entered into the contract with his surety whereby the mortgage was executed so that in case he did not satisfy the debt and the surety was compelled to, recourse could be had to the collateral security. The payment by the surety of the debt would not cancel it as to the principal debtor, who yet would remain liable for its satisfaction out of his own property. Had the principal creditors possessed collateral security and the personal surety had paid the indebtedness it would hardly be doubted that he would be entitled to be subrogated to the rights of the creditors to such collateral security; and on a parity of reasoning, we can see no difference in principle as to the right of the principal creditors to be subrogated to the rights of the surety upon his inability or failure to respond to his obligation."

This case was followed in *Harlan County v. Whitney*, 65 Neb. 105, 90 N. W. 993, 101 Am. St. 610, where the court said:

"Ezra S. Whitney, as treasurer of the county of Harlan, had given the required bond, with several sureties, for due performance of the duties of his office. Toward the end of his term a suspicion arose that he was short in his accounts. Thereupon, in order to indemnify said sureties, he and his wife executed a deed conveying the lands in controversy to one Roberts as trustee, reciting expressly that he was trustee for the sureties on said Whitney's official bond. A shortage having occurred as anticipated, the successor of the trustee conveyed said property to the county, which brought this suit, alleging that the deed was intended as a mortgage to

secure said sureties and the county against loss, and praying foreclosure. A decree was rendered accordingly, from which this appeal has been taken.

"It is argued that there is no evidence to sustain the decree because the proof shows clearly that said conveyance was intended to secure the sureties only, and that there is no evidence in support of the allegation that it was intended for security of the county as well, nor is it shown that the sureties have paid the amount due on the bond. But it is elementary that a creditor is entitled to enforce for his own benefit any securities which the principal debtor has given his surety by way of indemnity. In equity, such securities are considered as held by the surety in trust for payment of the principal obligation. In a sense they belong to the creditor, and proof that they were given to indemnify the surety would be sufficient to support the allegation that they were given for further security of the creditor, if such an allegation were necessary. *Blair State Bank v. Stewart*, 57 Nebr. 58, 63; *Longfellow v. Barnard*, 58 Nebr. 612, 617. In the latter case it was held that a mortgage given to indemnify a surety or guarantor is in legal effect a security to the owner of the debt, even though he did not originally rely on it or know of its existence. It follows that when the sureties, through their trustee, assigned the security to the county by conveyance of the land, the county could enforce it, although the sureties might not have done so themselves without first discharging the obligation. The security is regarded as given for discharge of that obligation, and must be applied thereon, either directly, or by satisfying those who have discharged it. Equity does not insist upon the circuitous procedure of payment by the sureties and enforcement by them. It looks to the substance, and will permit or even require an application upon the debt directly at suit of the creditor. . . .

"We are unable to see any reason why, after default in the conditions of such bond, the county may not take advantage of securities given by the treasurer to the sureties thereon, whether by way of suit for subrogation or by procuring an assignment from the sureties, as any other creditor might do."

See, also, *Whitehead v. Henderson*, 67 Ark. 200, 56 S. W. 1065.

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The real controversy being between Martin and the Elliotts, their rights are to be determined by reference to the building contract and bond which is a promise to pay in any event. The stipulations in the trust deed are for the benefit of the surety and it is not resisting the execution of the trust.

In *Brown & Haywood Co. v. Ligon*, 92 Fed. 851, the defense was "that the bond sued on is one of mere indemnity, and that the obligees in the bond are not shown to have been actually damnified." The court had resort to and construed the primary obligation, which was a building bond, and found that the surety had become a surety for the performance of all the "covenants and conditions of the building contract." It was held:

"That the bond sued on is, in effect, an agreement that Long shall carry out the terms of his contract with Pierce county, including the payment of subcontractors for all materials furnished by them, and used in the construction of the court house and jail in question. It is also an agreement to save Addison, and the others who were sureties on Long's bond, harmless from the obligation and liability which they had assumed as sureties on that bond, and, in addition thereto, is an agreement to save Addison and others harmless from actions, cost, and damages. Such being the condition of the bond, it is more than a bond for indemnity, and the actual payment of the judgments obtained by the Brown & Haywood Company and others against Addison and others is not a necessary prerequisite to liability of defendants in this action. *Johnson v. Risk*, 137 U. S. 300, 11 Sup. Ct. 111; *Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Locke v. Homer*, 131 Mass. 93; *Farnsworth v. Boardman*, Id. 115; *Shattuck v. Adams*, 136 Mass. 34; *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439; *Jones v. Childs*, 8 Nev. 121. . . . If the complainants Addison and others could have recovered, the case clearly falls within the principle entitling the complainant the Brown & Haywood Company to be subrogated to the rights of Addison and others. The defendants' underwriting bond is a security taken by the Brown & Haywood Company's debtors, Addison and others,

which, by reason of their insolvency, the Brown & Haywood Company is entitled to resort to, as an equitable asset, to satisfy its demands against its principal debtor."

In so holding, the court did no more than to apply the maxim that equity will do that which ought to be done. This case being between the principal debtor and the creditor on the contract and the bond, it can make no difference whether the surety has discharged its obligation (suffered loss or damage) or not, for equity will treat it as discharged in virtue of the insolvency of the surety and will make all assets in its hands available for the discharge of the principal debt. Nor does it make any difference whether the principal creditor knew of the contract of indemnity between the principal debtor and the surety. *Keller v. Ashford*, 133 U. S. 610; *Curtis v. Tyler & Allen*, 9 Paige Ch. 431.

To state the proposition in another way, if the surety company were solvent and able to respond, the Elliotts would have a right of action against the surety company on its bond, and could compel the company to use the trust property to satisfy the bond. Under the present state of facts, the Elliotts being creditors of the surety company, are entitled to take the assets in its hands and apply them to the discharge of the specific obligations which it assumed when it signed the bond and which it would be called upon to pay but for its insolvency. To hold otherwise would be to say that a surety who held property in trust to meet a debtor's obligation to another could discharge its obligation of suretyship by becoming insolvent. It would seem to be reasoning in a circle to say that, because the surety company became insolvent and unable to pay its obligation and has neglected to perform its contract, the creditor cannot assume directly and at once the same legal position that he might have taken if the surety company were solvent and contesting his claim. The sum of the authorities may be stated thus: Equity will seize upon and execute a trust when derelict between a principal debtor and his creditor,

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when the subject-matter of the trust has been pledged by the debtor to meet a specific obligation that the debtor is primarily obligated to pay and but for which the trust would not have been created,

“upon the ground that the surety, being the creditor’s debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor.” *Keller v. Ashford, supra.*

But it is said that there can be no subrogation for the reason that subrogation, although it does not rest upon contract, always grows out of contract, and that contracts will not be distorted so as to admit subrogation in the absence of a clear expression of intention; that there is no privity of contract between the Elliotts and the Martins of which the property now sought to be charged is the subject-matter. We have already shown by reference to the authorities that equity charges the property upon the theory that there is a privity, and, where this is so, the contract of the surety ought to be performed; that equity has done or will do what the surety has engaged itself to do, which in this case was to apply the property held by it to the satisfaction of any loss that might occur to the Elliotts by reason of their contract with Martin.

The supreme court of this state has taken its stand with those courts which have declared that the right of subrogation will be allowed when the equities of the case demand it. *Murray v. O’Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. Martin executed a bond with surety as a condition precedent to the building contract. His obligation in equity is no more or less than his contract obligation to save the other contracting party harmless. The ultimate object and purpose of the Martins’ trust deed was to save the Elliotts as well as the surety company harmless; to pay their debt, if any, out of their own property. They pledged it for

that purpose, and equity, having jurisdiction of the parties and the subject-matter, will reach out and apply the trust fund to the ultimate purposes of the trust.

There is some suggestion that Martin entered into another contract which may have fallen under the protection of the trust deed. Whatever the fact may be, we are of opinion that the rights of the Elliotts would not be entirely defeated. They might be subjected to a marshaling of the assets in the event that a claim is made upon the receiver, but with that contingency neither this court nor the respondent Martin have anything to do at the present time.

The judgment of the lower court is reversed, with directions to enter such decree as will protect the interest of the appellants Elliott and the receiver in the trust property, subject, however, to the lien of the Johnson mortgage.

Crow, C. J., PARKER, GOSE, and MORRIS, JJ., concur.

[No. 12038. Department One. January 8, 1915.]

AMBROSE FRED COLVIN *et al.*, *Respondents*, v.
DELBERT CLARK, *Appellant*.¹

ACTION—NATURE—LEGAL OR EQUITABLE. An action brought for an accounting and the cancellation of a contract resolves itself into an action at law for the amount due on the contract, where there is neither allegation nor proof to sustain an equitable suit for an accounting, and nothing more is involved than a simple issue of fact as to how much is due plaintiffs under their contract of sale of timber, to be paid for monthly as cut and scaled by defendant.

TRIAL—FINDINGS OF FACT—NECESSITY. In an action at law tried by the court, findings of fact and conclusions of law are a necessity, in order to support the judgment of the court, under Rem. & Bal. Code, §§ 367, 368, requiring findings in such cases and providing that they stand as the verdict of a jury, except as qualified as to their weight by § 1736.

APPEAL—REVIEW—ERRORS NOT AFFECTING SUBSTANTIAL RIGHTS—REMAND FOR FINDINGS OF FACT. Under Rem. & Bal. Code, § 307, pro-

¹Reported in 145 Pac. 419.

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viding that the court shall disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed by reason thereof, the supreme court, on reversing a cause for failure of the trial judge to make findings of fact and conclusions of law, will remand the case to the court below with instructions to make such findings and enter judgment thereon.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 15, 1913, in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Troy & Sturdevant, for appellant.

Thomas M. Vance and Harry L. Parr, for respondents.

CHADWICK, J.—On the 25th day of April, 1912, plaintiffs and defendant entered into a written contract for the sale of the merchantable fir timber on certain lands belonging to the plaintiffs, in consideration of the payment of two dollars per thousand feet. The material parts of the contract follow:

“It is agreed that the amount of timber upon the said land is 10,825,000 feet; said timber shall be paid for by the party of the second part as the same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet as aforesaid. All timber logged each month shall be settled and paid for by the party of the second part on the 15th of the following month until said timber is fully paid for. The party of the second part, his successors and assigns agree to take and remove said timber and pay for the same as above set forth within five years from the date of this contract. . . . The sum of two thousand dollars shall be deposited by the party of the second part in the Capital National Bank of Olympia, to the credit of the guardian of the minor children of Ambrose Fred Colvin and Anna Colvin upon the execution of this contract, and said two thousand dollars cash shall be credited to the party of the second part on the last one million feet of timber cut.”

The land is divided by a road and by other physical conditions, and is referred to by the parties, and will be by us, as the north and the south side. Prior to the time the contract was entered into, the parties had negotiated between themselves concerning the sale of the timber on the south side. There is no controversy between them as to the amount of timber on that tract. All agree, for the purposes of this suit, that it was 5,825,000 feet. A memorandum showing this amount had been reduced to writing. Cruises of the north side timber had been theretofore made, the quantity of the timber as shown by the cruises varying. The cruises were: Valentine, 5,530,000 feet; Champlin, 4,902,000 feet; and Manning, 4,800,000 feet. The parties met in the office of Mr. Otis in Olympia to reduce their contract to final form, and it was there agreed that the north side timber should be included in the sale and a contract was written so as to include a description of the land upon which it was growing.

Defendant built a logging road into the north side and proceeded to log the land, and has removed all but 390,000 feet, as estimated by witness Moore, a cruiser who was put upon the stand by plaintiffs. Defendant had cut some cedar and ties and spars that were not scaled at the mill, and had removed his active logging operations from the north side. Plaintiffs then brought this action praying for an accounting and a cancellation of the contract. They have endeavored to maintain their action as a suit in equity. The court denied a cancellation of the contract, and an appeal has been taken from the order.

Whatever may have been the original theory of the plaintiffs, it seems to us that this is not a suit in equity, but a simple action at law for the amount due on contract. There is neither allegation of fact nor proof of fact to sustain the action as an equitable suit. It is true that plaintiffs, in demanding that which they conceived to be their due, have said that an accounting is necessary and have prayed for an accounting. Under the contract, plaintiffs were entitled to

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payment for all of the timber removed during the previous month. Payments were made from month to month. Plaintiffs brought this action at a time when they believed that the defendant was abandoning the north side with part of the timber uncut. They claim no more than this: that they have not been paid all that is due. This fact would not change the controlling principles of law. The action remains as one upon contract, and it cannot be made an equitable suit by a demand for an accounting unless that demand is based upon some reasonable ground justifying equitable interference. There is no allegation that an accounting is necessary to prevent a multiplicity of suits. There is no fiduciary relation between the parties, nor is it alleged, nor does the proof show, that mutual accounts have been kept by the parties and that they are so involved that a jury would not be likely to arrive at the true state of the account. The fact that the proof is difficult or that the proof is largely in the keeping of the opposite side, is not enough in itself to justify equitable interference. In fact, the proof in this case upon either side is quite simple. It is purely a question of the amount of timber cut by defendant. The payment is a mere matter of calculation. It seems to us that counsel have confused the words "accounting" and "payment." If every difference between parties to a contract as to the amount due thereon would justify an accounting, there would be no such thing as an action at law for breach of contract. Nor can the character of the action be fixed by the fact that plaintiffs have used phrases and demands peculiar to equity. A court will look to the substance of the pleadings and to the character of the proof in determining the character of the proceeding.

In *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572, an action was brought as a law action. After trial, "the action was purely equitable." So in this case, there was no pretense of reliance upon equitable principles in the trial of the

case. The court determined a simple issue of fact, and entered a money judgment for the amount he found due.

Defendant has been quick to appreciate the legal situation of the plaintiffs, and in the court below and in this court has insisted that the trial judge should have made findings of fact and conclusions of law. To save the point, findings and conclusions were proposed and were refused. Counsel for defendant has brought his case squarely within the following decisions of this court: *Bard v. Klee*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95. We would be glad to hold, if it were possible to do so in the light of our previous decisions and Rem. & Bal. Code, § 367 (P. C. 81 § 645), that the refusal of the court to make findings was error without prejudice, but the statute and the duty that is upon us to follow rules of practice and procedure arising out of the construction of statutes compels a holding that the error was prejudicial to the right of the defendant.

Findings, under Rem. & Bal. Code, § 368 (P. C. 81 § 647), except as qualified as to their weight by § 1736 (P. C. 81 § 1225), stand as the verdict of the jury. In one of our earlier cases, it is said:

"Judgments of law are founded upon general or special verdicts of juries, or findings of the court which take the place thereof. Without such verdicts or findings, there is nothing to support the judgment." *Kilroy v. Mitchell*, *supra*.

The purpose of § 367 is to permit, if not to encourage, appeals without bringing up a statement of facts, for, as is said in the *Kilroy* case just cited, "a judgment at law will usually stand or fall upon the verdict or findings, without any reference to the evidence as a whole." The first ruling upon the question before us is found in *Bard v. Klee*, *supra*. Our court reviewed the California cases and noted the confusion that had arisen in that state by reason of the courts'

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attempts to find a way around a similar statute when occasion seemed to require it. It is there said:

"We have the opportunity, to shape the practice in this state so that our successors may not have to repeat the helpless plaint of the California supreme court,"

and it was accordingly held that a recital in a judgment that "the court finds the matters and things set forth in the complaint are true" was not a compliance with the statute. In a later case, *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95, the statute was held to be mandatory. So far as we are informed, there has been no departure from the rule of these cases in law actions.

The point raised by counsel for defendant is well taken. But it does not follow that the action will be reversed and remanded for a new trial. While the statute, Rem. & Bal. Code, § 307 (P. C. 81 §303), has never been invoked, so far as we know, in a case like this, it seems to us to be peculiarly applicable. It is provided:

"The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

In the case at bar the testimony has been taken. No right of either party will be conserved by a new trial. The case fails here because the refusal of the trial judge to make findings "affect(s) the substantial rights of the adverse party." This can be corrected, if the case is remanded with instructions to the lower court to make findings and enter a judgment thereon. There is no reason in law or sound sense for a retrial. The judge had and will have the whole testimony before him and he can find, presumptively at least, the same facts and draw the same conclusions as he would if the testimony were taken over again. We have, therefore, determined that this case shall be remanded to the court from whence it came, with instructions to the trial judge to cause

findings to be prepared and to enter judgment thereon from which either party may appeal. Defendant will recover his costs in this court. The taxation of the costs of the trial in the court below will be reserved until the final disposition of this case.

CROW, C. J., GOSE, MORRIS, and PARKER, JJ., concur.

[No. 12046. Department One. January 8, 1915.]

THE CITY OF SPOKANE, *Appellant*, v. LADIES' BENEVOLENT SOCIETY *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CHANGE OF STREET GRADE—LIABILITY—PAPER GRADE. Where a "paper" grade had not been acted upon and no physical grade had been made, a city is not liable for damages to unimproved abutting property by reason of a change of the grade.

SAME—RELIANCE ON "PAPER" GRADE—IMPROVEMENTS—ESTOPPEL. Where a city has adopted a "paper" grade of one of its streets and, pending a physical grade thereof, an abutting lot owner has improved his property with reference to such "paper" grade, he may recover damages as for a change of grade, his right being referable to the doctrine of estoppel.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 10, 1914, in condemnation proceedings, upon the verdict of a jury awarding damages for a change in a street grade. Modified.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and *Dale D. Drain*, for appellant.

Skuse & Morrill, for respondents.

CHADWICK, J.—The grade of Calispel street, in the city of Spokane, was established by ordinance in the year 1889. The streets were not brought to a physical grade, although some property has been improved with reference to what we

¹Reported in 145 Pac. 443.

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will call the paper grade. In 1910, the city, intending to grade the street, passed an ordinance reestablishing the grade of the street. The former paper grade was materially changed. The city then brought an action to condemn and assess the damages, if any, caused by the grading of the street to the grade line established by the later ordinance. Respondents are owners of abutting lots.

This court has held:

"In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication." *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

See, also, *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916, and authorities cited therein; *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089; *Muller v. Great Northern R. Co.*, 75 Wash. 631, 135 Pac. 631.

It is not contended by the corporation counsel that the city is not liable for the damaging of property that has been improved by the owner in faith of the first or paper grade. "The question," as stated by counsel for respondents, "is whether a city of the first class can establish and fix the grade of a street by an ordinance duly enacted, and thereafter change such grade, and grade the street to the reestablished grade to the damage of abutting property, and not be liable to the owners of such property for the damage so caused." Or, in other words, is a paper grade unacted upon by the city a grade established, or an initial grading, within the meaning of our own cases so as to prevent a change thereof without meeting the damages to unimproved property under art. 1, § 16 of the constitution, which provides that private property shall not be taken or damaged for a public use until the damages have been ascertained and paid.

It cannot be denied that a grade is in a sense established when it is defined by ordinance, but we cannot make ourselves

believe that it is sound doctrine to hold that a city having an original and continuing power to establish grades and to grade streets in conformity therewith, Abbott, Municipal Corporations, § 810, should be held to a rule of too strict interpretation.

If no ordinance had been passed in 1889, the city would not have been foreclosed of its right to make an original grade without payment of the resultant damages, notwithstanding the lapse of time or the improvement of the property. *Mattingly v. Plymouth*, 100 Ind. 545. For it is held, and properly so, that the holding and improvement of the property is subject to the legislative will of the city as to the time when a street shall be graded; that this will not be controlled by the courts, and consequently there can be no estoppel because of the lapse of time, either to the burden of the city or to the benefit of the property owner.

The right to recover damages at all against a city for grading or regrading a street rests upon the theory that there is a physical invasion. Until there has been a physical invasion, therefore, it would be more logical to hold that the mere adoption of a paper grade would not exhaust the right of the city to redefine the grade line so as to make a grade that will better serve the whole public, compensating only those who have built upon or improved their property and who are damaged by the change. Compensation being allowed, not upon the theory that the city cannot change the grade of a street—for that it has ample statutory authority to do—but upon the ground of estoppel, or, as Judge Dillon says, upon the “basis of natural justice.” Dillon, *Municipal Corporations* (5th ed.), § 1865.

The cases involving the exact question here presented are few. In fact, we have found none which can be called *quatuor pedibus* with it. There are, however, expressions in the books which indicate that the subject has been considered.

It has been quite generally held that the mere establishment by ordinance of a paper grade changing an existing grade

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or establishing an original grade in those jurisdictions where damages are allowed therefor will not give a right of action. The right rests inchoate until such time as the city acts upon it. A paper grade gives no right of action. *Clark v. Philadelphia*, 171 Pa. St. 30, 33 Atl. 124, 50 Am. St. 790. Damages for the grading or change of grade are not given until the actual operation on the ground. *Plan 166*, 143 Pa. St. 414, 22 Atl. 669.

In New Jersey, awards for damages flowing to those who had built upon their land, because of changes or alterations in street grades, are made under certain statutes similar in form and purpose to Rem. & Bal. Code, § 7874 (P. C. 77 § 1165). It is said in *State etc. v. Sayre*, 41 N. J. L. 158:

"As the claim of the land owners can stand on these statutes alone, it is plain that those who had no 'house or other building' erected on their land at the time of the alteration of grade, have no legal right to compensation, and the awards made to them must be set aside, unless some of the reasons alleged for the non-interference of this court be sufficient."

A consideration of these and other cases impelled Mr. Abbott to say: "The mere establishment of a grade on paper prior to the one which was consummated by physical construction cannot be considered." 2 Abbott, Municipal Corporations, p. 1917, note 584.

The case, or rather the observations of the judge who wrote the case, which most nearly touches this case, is *Manning v. Shreveport*, 119 La. 1044, 44 South. 882, 13 L. R. A. (N. S.) 452:

"The adoption of a (paper) grade may be said to fix the liability of the property affected by it to future damage, but the weight of authority is to the effect that such damage is not recoverable until actually inflicted, and hence that it is the owner at the time who may recover it. A municipality may not be able to grade all of its streets at one time, but it has the undoubted right to declare in advance what the

grade shall be, and though, quoad property then existing and affected or to be affected, the liability to damage is thereby imposed, and the right to recover it may be said to attach to the property, to be exercised when the damage shall be actually inflicted, *it cannot be said that any* such liability is imposed, or that any such right attaches, with respect to property which is then nonexistent. In other words, by the adoption of a grade, to be thereafter established, the municipality fixes the status of an existent lot as property which must sooner or later be affected by the actual establishment of the grade so adopted, and the right to recover for such damages as it may sustain, though inchoate at the moment, becomes perfect when the damage is actually inflicted, and may be exercised by the then owner of the lot. But, if the lot be not improved when the grade to be actually established in the future is adopted, no liability for damage to improvements is imposed, and no right of recovery with respect thereto, whether inchoate or otherwise, is created. Under such circumstances, if the then nonexistent improvements are subsequently, and at the option of the owner, placed upon the lot, they come into existence subject to conditions already established and of which the owner of the lot has notice, and he must govern himself accordingly."

The supreme court of Utah has held that an abutting lot owner can recover consequential damages for an original grade of the street, but it is worthy of notice that the writer of the opinion in the case of *Kimball v. Salt Lake City*, 32 Utah 253, 90 Pac. 395, 125 Am. St. 859, 10 L. R. A. (N. S.) 483, where many cases were considered, found the rule in some jurisdictions to be,

"It is likewise true that in some states the law is still to the effect that consequential damages are recoverable only where one established grade is changed to another, and that until the grade is actually established and acted upon, the municipality is not liable for consequential damages."

This finding seems apropos, inasmuch as we hold that consequential damages are recoverable where a grade once made is changed. It is our opinion, as it was the opinion of the writer, gathered not so much from apt words and ex-

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pressions as from the logic of the cases, that a grade is not actually established when considered in connection with statutes or constitutions allowing damages for a "taking or damaging" until it is "acted upon." The logic of our former decisions is that there can be no taking or damaging of abutting property subject to an initial grade, and where the owner of an unimproved lot is in the same position he would have been in had the city never passed the ordinance of 1889, he is in no position to assert or claim damages for the actual grading of the street.

Coming now to the cases relied on by respondent: *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048; *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 199; *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304. The *Sargent* case does not touch our question. The court had under consideration a statute—Rem. & Bal. Code, § 7874 (P. C. 77 § 1165)—protecting owners who had built with reference to a grade established by actual improvement of a street to a grade, or by reference to a grade formally adopted by ordinance. It is no broader in its holding than the statute it construes. The cases cited in the *Sargent* case all go to the one proposition, that a grade established, either by ordinance or user and acted upon by the property owner, is such an establishment as will compel a city to meet the resultant damages.

In *Stewart v. Clinton*, 79 Mo. 603, the street had been graded.

The case of *Mattingly v. Plymouth*, 100 Ind. 545, goes primarily to the degree of proof required to show the establishment of a grade. In so far as it bears on this case, it is consistent with our reasoning:

"As the initial point in the appellant's case, it was necessary to show the existence of a duly established grade by the city authorities at the time the improvements were made; that the improvements were made with reference to a grade so established, and that the city was proceeding to change

the grade so established, to the appellant's damage, without the assessment and tender of the damages so occasioned. This was neither averred in the complaint nor shown in the evidence, and so both are fatally defective."

The case of *Nebraska City v. Lampkin*, 6 Neb. 27, also goes to the degree of proof required to show an established grade and seems to hold, inferentially at least, that a grade is not established until it is defined and "worked." In the *Rettire* case, the grade had been established and the street improved under an ordinance passed in 1903. The only question before the court was whether the city was bound to follow the elevation of the curb when later fixing a grade for sidewalks. In the *Jones* case the fact, as found by the court, was that there was a paper grade; that it was the only grade and that the plaintiff Jones had made his improvements in defiance of it. It is the antithesis of the case of the claimants in this case, who have made improvements with reference to the paper grade, and is, therefore, an authority sustaining their right to recover damages as for a change of grade.

In the *Thorberg* case, the city council by resolution had "adopted" the natural level of the land as a grade and had improved the street at the expense of the abutting property. That case is sustained by reference to the doctrine of estoppel, the elements of which are entirely wanting in this case.

The case of *Goodrich v. Milwaukee*, 24 Wis. 422, is also relied on. In that case the street had been paved at the expense of the lot owners and it was held that the city was estopped to regrade without meeting the consequent damages.

Finally, it is insisted that this court has settled the present controversy in *Hart v. Seattle*, 42 Wash. 113, 84 Pac. 640, where it is said:

"It is first contended that it was error to grant any restraining order in the premises. It is said that the city

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denies that it is changing the grade, and it is also argued that, inasmuch as the lots are unimproved, the threatened change can result in but slight damage, for which reason the court should not have interfered. With regard to the fact as to the threatened change of grade, we think the court was justified, under the pleadings and affidavits submitted, in reaching the conclusion that such change was threatened by the city's officers. We also think the showing as to resultant damage justified interference by injunction. One of the affidavits placed the damages as high as \$5,000, and the attendant facts stated are such as, we think, bring the case within the rule established by this court, that where a proposed change of the grade of a street will seriously damage an abutting owner's property, the change may be enjoined, unless the damage has been ascertained and paid."

Counsel say "plaintiff's (Hart's) property was unimproved." That case holds that unimproved property may be damaged by a change of grade. The question of damages for an initial grade was not involved. In fact, reference to the briefs and record will show that the city had not only established but had physically graded the street in front of the property and was about to make, as was alleged, a most material change. The defense of the city was that the grade was too steep for asphalt pavement and that "it was necessary to take up and relay the pavement in front of lots 13 and 14," being the lots owned by plaintiff.

Our conclusion is that one who buys a city lot abutting a street dedicated but not graded takes it subject to the continuing right of the city to establish an initial street grade which will be conformable to the convenient use of the public; and, if his property be unimproved at the time a physical grade is made, his injury, if any, falls within the operation of the rule *damnum absque injuria*. If, on the other hand, the city has adopted a paper grade, and, pending a physical grade, a lot owner has improved his property with reference to such paper grade, he may recover damages as for a change of grade, his right being referable to the doctrine of estoppel.

It is but fair to say that the novelty of the questions occurring at the trial impelled the trial judge to express a doubt as to the true rule. He accordingly admitted all testimony offered, and overruled motions for a judgment and for a new trial, upon the theory that, if this court held with the city, it could "simply disregard the jury's verdict as to all the lots not improved," whereas, as he said, if he ruled otherwise and this court did not sustain his judgment the case would have to be remanded for another trial.

Remanded, with instructions to enter a judgment consistent with this opinion.

Crow, C. J., Gose, Morris, and Parker, JJ., concur.

[No. 12081. Department Two. January 8, 1915.]

C. D. WILBERT, *Respondent*, v. P. A. DAY *et al.*, *Appellants*.¹

PROCESS—RETURN—CONCLUSIVENESS—SUBSTITUTED SERVICE—CONTRADICTION—SUFFICIENCY. Since a sheriff's return of process may be rebutted as to facts not within his special knowledge, his return of a substituted service, under Rem. & Bal. Code, § 226, to the effect that he served the defendant by leaving a copy with his wife at the house of "the usual abode" of the defendant at S. in this state, is overcome, and the service should be quashed, where it appears by the uncontradicted affidavit of the defendant that he was an elector of Idaho residing at H. in said state and had no residence or usual abode in this state, and that his wife when served was in temporary lodgings at S. where she had gone temporarily for medical treatment.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 10, 1914, by default, after denying a motion to quash a service of summons. Reversed.

John H. Pelletier, for appellants.

Scott & Campbell, for respondent.

¹Reported in 145 Pac. 446.

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MOUNT, J.—The only question upon this appeal is the sufficiency of the service of the summons upon the defendant, L. F. Connolly, to give the court jurisdiction of the person of the defendant. The service was made by the sheriff of Spokane county where the action was pending. Omitting the formal parts of the sheriff's return, it is as follows:

"I served the within summons and complaint upon the within named defendant, L. F. Connolly in the county of Spokane, State of Washington, on the 6th day of December, 1913, by then and there delivering to, and leaving with Mrs. L. F. Connolly, at the dwelling house, and the house of the usual abode of said defendant L. F. Connolly, for said defendant a true copy of said summons and complaint in said action.

"The said Mrs. L. F. Connolly being then and there a person of suitable age and discretion, and resident therein, and a member of the family of said defendant, to wit, the wife of said defendant, I, after due diligence and inquiry, being unable to find the defendant in said county."

After this service was made, the defendant appeared specially and moved to quash the service. At that time, he filed an affidavit stating, in substance, that, for several years last past, he has been and still is a resident of Harrison, Kootenai county, Idaho, and is an elector in said state only, and has his usual place of abode therein; that he has no residence or usual place of abode in the state of Washington; that his wife was temporarily in Spokane for the purpose of procuring medical and surgical treatment for a minor son; that the purported service of the summons was made by leaving with his wife a copy of the summons in Spokane, Washington, at the temporary lodgings of his wife; that these temporary lodgings were not the usual place of abode of the defendant. This affidavit was not denied. The motion to quash the service was denied, and thereafter a judgment by default was entered against the defendant. This appeal followed.

The statute provides at Rem. & Bal. Code, § 226 (P. C. 81 § 143-5), that the summons shall be served by delivering a copy thereof "to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service." The sheriff's return upon a summons, in so far as it states facts not within the special knowledge of the officer, is *prima facie* only, and may be rebutted. In the case of *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235, which was a case similar to this one upon this point, where service was had upon the father of the defendant, and where the court allowed the defendants to prove that they were residents of and lived within the county at the time of the service, but resided in a different place in the county from where the father of the defendant resided, and had no notice of the proceedings, we said:

"The plaintiff contends that this proof was inadmissible on the ground that the sheriff's return could not be contradicted. If the return was to be construed to show a service upon the father of Robert O'Neil, at Robert O'Neil's usual place of residence, we think that last statement could be contradicted, and that it is not within the rule contended for by the plaintiff."

And in the case of *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141, where the respondent contended that the officer's return must be taken as conclusive, and that it could not be attacked, we held otherwise. We there quoted from a Kansas case (*Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466), saying:

"We find upon examination that the courts have generally held the sheriff's return on *mesne* and *final* process conclusive between the parties and privies, though this is by no means a rule of universal application; but that in cases of *original process* there has been a general disposition to let in the truth . . . we know of no statute that makes a sheriff a final and exclusive judge of where a man's residence

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is, or what is the age of a minor, or who are the officers of a corporation, or where their place of business is; and when the statute made it the duty of the sheriff to ascertain these facts it did not make his return of such facts *conclusive*. Of his own acts his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive."

Several authorities are there cited to that effect. So it is clear, therefore, in this case, that the sheriff's return upon the question of the residence and usual place of abode of the defendant was merely *prima facie*, and subject to be refuted by the truth.

The affidavit in this case is clear to the effect that, at the time the service was made upon the defendant's wife, she was not at her residence or usual place of abode. The usual place of abode of the defendant Connolly was in the state of Idaho. His wife was temporarily in Spokane. These facts are not in dispute. They are practically conceded upon the record. It seems plain, therefore, that no valid service was made upon the defendant, and the court should have quashed the service.

The judgment entered by default against the defendant Connolly is therefore reversed.

Crow, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12083. Department One. January 8, 1915.]

HAZEL HELEN JOHNSTON *et al.*, by their Guardian *etc.*,
Appellants, v. GEORGE NICHOLS, *Respondent*.¹

LANDLORD AND TENANT—DEFECTIVE PREMISES—LIABILITY OF LANDLORD AND TENANT—CAVEAT EMPTOR. In the absence of warranty or covenant to repair, the landlord is under no legal duty to find and disclose obscure defects in the leased premises of which he has no knowledge, but the doctrine of *caveat emptor* applies in such cases; hence the landlord is not liable for personal injuries to a tenant resulting from the giving way of a porch railing the structural weakness of which was as patent to the tenant as to the landlord.

JUDGMENT—NON OBSTANTE VEREDICTO. Where the court can say, as a matter of law, that there is neither fact nor reasonable inference from facts to support a verdict for plaintiff, it is warranted in entering judgment notwithstanding the verdict, and is not restricted to the granting of a new trial, if on the facts the plaintiff could not state a cause of action.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 29, 1913, in favor of the defendants, notwithstanding a verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

C. C. Dalton and Herbert W. Meyers, for appellants.
Revelle, Revelle & Revelle, for respondent.

CHADWICK, J.—For nearly five years prior to October 7, 1911, Ella Jennie Johnston had been a tenant of the defendant, occupying premises in the city of Seattle. In the summer of 1911, the street in front of the property was improved by regrading and the building was adjusted to the new grade by putting a brick story under the frame structure that had been the subject of the tenancy. Mrs. Johnston had remained in the building during the period of repair or reconstruction. On November 15, 1911, Mrs. Johnston

¹Reported in 145 Pac. 417.

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with another, was in the act of passing a bed spring over the railing of a porch extending across the top or third story of the house as reconstructed. It was their intention to lower it or let it fall to the ground some twenty-two feet below, when the railing gave way and Mrs. Johnston was precipitated to the ground, sustaining injuries of which she died.

This suit is brought by the children of Mrs. Johnston, by their guardian *ad litem*, to recover damages. There is proof that the railing was structurally weak; that its weakness might have been known to any one by a slight examination, although not patent without some examination. The case went to a jury and a verdict was returned in favor of plaintiffs, whereupon the court, on motion of counsel for the defendant, entered a judgment notwithstanding the verdict. From this judgment, plaintiffs have appealed.

The case resolves itself into a pure question of law, and we shall not go further into the facts. The contract of lease, which was in writing, contained the following stipulations:

"Said lessee hereby agrees that said owner or his agent shall not be liable for any damages to property or personal injuries caused by any defects in said premises, or hereafter occurring. . . .

"Said lessee accepts said premises in their present condition and agrees to leave said premises in as good order and condition as they are now in, excepting the necessary wear and tear thereof and damage by the elements or fire."

The relation between a landlord and his tenant, and the duty of the landlord to answer for negligence, has been considered by this court in two recent cases. *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 Pac. 927; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917. In speaking of the liability of the landlord for negligence, we said in the *Mesher* case,

"The liability as for negligence must arise either from a breach of some general duty arising as a legal incident to

the relation of landlord and tenant created by the contract, or from the negligent performance or negligent failure to perform some general duty imposed upon the landlord by the contract. A mere breach of contract, in the absence of some general duty, gives no basis for an action in tort."

The only question for us to consider, then, is whether the landlord has failed to perform some duty imposed by law or by contract. It is held in those cases that a tenant takes the property leased *caveat emptor*. In the *Howard* case it is said that the rule *caveat emptor* rests in contract. There is an implied assumption on the tenant's part of all risks arising out of obvious defects or conditions affecting the safety or fitness of the premises. In the absence of a warranty or covenant to repair, there is no greater duty of inspection upon the landlord than there is upon the tenant. The law imposes no burden of diligence or active duty upon the landlord to find and disclose obscure defects or dangers. The only exception in the absence of a contract to the rule *caveat emptor* is where there are obscure or latent defects or dangers known to the landlord and not known to the tenant. This exception is grounded in reason and in the fundamental principles of justice. It rests upon, and is sustained by, the moral obligation of every man knowing a danger to warn the innocent or the ignorant against that which may beset or befall him in the use of property which is put into his hands for a present or prospective consideration moving to the donor, vendor, or lessor.

In the case at bar, the railing had been made fast to the outer wall of the house with small nails or brads, toe-nailed into the wood. Either on account of the small number of nails used by the carpenter, or by reason of the accumulation of rust, the railing was, or had become, structurally weak, but it is not contended that the defect was obvious or that it could have been more readily seen and appreciated by the landlord than by Mrs. Johnston, who had occupied the premises, as we have said, for a term of years. We are

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not disposed to reexamine the authorities or discuss the principles pertaining to the cases cited. It is enough to say that we find no facts that would take this case out of the rule there laid down—that is, in the absence of an agreement to repair, the landlord is under no legal duty to search for defects of which he has no knowledge.

Counsel contend in this case, as was contended in the *Howard* case, that there is a higher duty put upon the landlord; that he should be held liable not only for a failure to disclose obscure defects actually known to him at the time of the lease, but that he should exercise reasonable care to discover such obscure defects and to divulge them. That phase of the case was passed upon, and we there pointed out that but one court in this country held to the rule invoked, whereas the greater weight of authority, as well as of reason, is to the contrary.

Believing that all of the contentions of appellants' counsel have been met in the *Howard* and the *Mesher* cases, we shall adopt them as controlling authority, as did the trial judge.

We have not gone into the suggestion of counsel that an agreement on the part of a tenant to assume the risk of structural defects is void as a matter of public policy, nor shall we review the authority cited on either side. As shown in the cases hereinbefore referred to, there was no common law liability on the part of respondent to answer for damages in the absence of a contract to repair, unless the defect was known and not divulged. The parties did not contract with reference to any public right, nor did they undertake to contract away any common law right. Adverting, then, to the ancient principle that there is no higher or better public policy than to encourage the right of private contract, where there is no restraining statute, we pass this phase of the case.

Finally, it is contended that the court erred in entering a judgment *non obstante veredicto*; that, under the rule an-

nounced in *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, the state of the record is such that the court could make no order other than to grant a new trial.

If it were possible, under the facts of this case, for the plaintiff to state a cause of action in law, the rule there announced might apply, but where the court can say, as a matter of law, that there is neither fact nor reasonable inference from facts to support a verdict, and there is neither fact nor reason upon which a verdict could stand, the order of the court will be sustained under the authority of *Paich v. Northern Pac. R. Co.*, 82 Wash. 581, 144 Pac. 919.

Other questions are raised in the briefs, but having decided that there was no primary liability to answer for damages, it is unnecessary to discuss them.

Affirmed.

Crow, C. J., Gose, PARKER, and MORRIS, JJ., concur.

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Citations of Counsel.

[No. 12101. Department Two. January 8, 1915.]

SAMUEL G. MOORE, *Appellant*, v. JULIA A. PARKER *et al.*,
Respondents.¹

REFORMATION OF INSTRUMENTS—DEGREE OF PROOF. Reformation of an instrument for mutual mistake will not be granted unless the evidence is clear and convincing that the writing was not what the parties intended and that the mistake was mutual.

SAME—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. The evidence does not establish mutual mistake warranting reformation of a mortgage and notes, which authorized a deficiency judgment against the mortgagors, where it appears that the mortgagors were persons of more than ordinary intelligence and education, one of them being a lawyer of experience, that they executed the mortgage and notes upon the customary printed forms, after consultation with a lawyer who claimed that the stenographer failed to include therein an agreement that no personal liability should rest upon the members, and that the notes and mortgage were signed without reading, and defendants' evidence as to such an agreement was denied and the denial corroborated and the agreement was not established by a preponderance of the evidence.

Cross-appeals from a judgment of the superior court for Yakima county, Grady, J., entered January 22, 1914, in an action to foreclose a mortgage, granting a deficiency judgment against one defendant and denying it as to the other. Reversed on plaintiff's appeal.

Englehart & Rigg, for appellant.

Parker, Richards & Fontaine, for respondents. A mistake in a written instrument caused by ignorance, mistake or negligence of a draughtsman will be corrected in equity. It does not matter whether the draughtsman was the agent of the party seeking the correction or of the other party. *Murray v. Sanderson*, 62 Wash. 477, 114 Pac. 424; *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210; *Linton v. Unexcelled Fire-Works Co.*, 128 N. Y. 672, 28 N. E. 580; *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Leitsen-*

¹Reported in 145 Pac. 440.

dorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; *Scott v. United States*, 12 Wall. 443; *Elliott v. Sackett*, 108 U. S. 132; 9 Cyc. 245A.

MOUNT, J.—This action was brought to foreclose a mortgage for \$4,000 upon certain described lands in Yakima county. The notes and mortgage are the usual form of notes and mortgage executed in such cases. The defendants Julia A. Parker and Ed. Parker, who were the makers of the notes and mortgage, appeared in the action and interposed three affirmative defenses, the first of which was the one relied upon and the only one necessary to be stated. It was to the effect, that, prior to the execution of the notes and mortgage, it was agreed between the parties thereto that there should be no personal liability upon the notes; that, by mistake, the notes and mortgage were so drawn as to render the defendants personally liable thereon, when in fact there was an agreement that they should not be personally liable. They therefore prayed that the notes and mortgage be reformed so that there should be no personal liability over against the makers of the notes, if the mortgaged property was not sufficient to extinguish the debt. This affirmative matter was denied by the plaintiff.

Upon the trial of the case, the court found that the contract was as alleged by the affirmative defense mentioned, but that the defendant Ed. Parker was so negligent in executing the notes and mortgage that he could not now claim that there was a mutual mistake. The court also found that Julia A. Parker was not negligent, and concluded that the notes and mortgage should be reformed as to her, and that there should be no personal liability against her upon the notes. A decree was entered to the effect that a personal judgment should be entered against Ed. Parker for any deficiency after the sale of the mortgaged property. A deficiency judgment against Julia A. Parker was denied. The plaintiff has appealed from so much of the decree as

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refused a deficiency judgment against Julia A. Parker, and the defendants have appealed from that part of the decree which authorizes a personal judgment against Ed. Parker.

This presents the only question made upon the briefs upon appeal. It is largely a question of fact. The rule is settled in this court that, before an instrument in writing will be reformed, the evidence must be clear and convincing that the writing is not what the parties intended it to be, and that the mistake was mutual. *Bruce v. Grays Harbor Drug Co.*, 68 Wash. 668, 123 Pac. 1075; *Hapeman v. McNeal*, 48 Wash. 527, 93 Pac. 1076; *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755; *Heffron v. Fogel*, 40 Wash. 698, 82 Pac. 1003.

In *Hapeman v. McNeal*, *supra*, we quoted the rule from 2 Pomeroy, Equity Jurisprudence (3d ed.), § 859, saying:

"Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a *mere* preponderance of evidence, but only upon a certainty of the error."

We are satisfied, from a careful examination of the record, that the evidence fails to show, even by a preponderance of the evidence, that there was any mutual mistake between the parties when the notes and mortgage in this case were executed. It is conceded that there were four promissory notes. Three of them were for \$500 each, and one for \$2,500. These notes were executed upon printed forms. The notes themselves contain no interlineations or additions to the printed forms. These forms do not provide that there shall be no personal liability against the makers. It is conceded that Julia A. Parker executed these notes, and that her husband, Ed. Parker, also executed them. The mortgage also is in the usual form. It does not contain any reservation that the mortgaged property shall be the only security for the payment of the debt. It was shown upon the trial of the case, without any dispute, that Ed. Parker, one of the makers of these notes and mortgage, was a

lawyer who had for twenty years practiced his profession. He was a man who had dealt largely in real estate transactions. He had executed many notes. He was a man of more than ordinary intelligence and knew the forms of contracts, and especially of notes and mortgages. His wife, Julia A. Parker, was, likewise, a woman of more than average intelligence. She had means of her own. Both makers of the notes and mortgage could read and write the English language and understood its purport. They testified upon the trial of the case that, at the time the agreement was made and these notes and mortgage were executed, it was understood between the payee of the notes and the makers that there should be no personal liability, but that the mortgaged property should be the sole security for the debt. They testified that, after the contract was made, the parties went to the office of a brother of Ed. Parker, which brother was also a lawyer practicing his profession, and related to him the contract which had been entered into; that this brother made memoranda of the terms of the contract and turned the same over to his stenographer to prepare the notes and mortgage; that this stenographer, instead of preparing the notes and mortgage as directed, failed to include in the notes and mortgage the agreement that no personal liability should rest upon the makers if the mortgaged property was insufficient to pay the debt; and that, relying upon the contract as drawn by the stenographer, the makers signed the notes and mortgage without reading them.

The plaintiff testified that there was no such agreement. He testified that the notes and mortgage as executed contained the whole agreement, and that there was no reservation of any kind, except as stated in the notes and mortgage themselves. There was other evidence which tended to corroborate his statements.

So far as the oral evidence goes, considering all of the witnesses as being equally credible, we are satisfied that the oral evidence is about evenly balanced upon the question

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whether there was or was not an agreement to the effect that there should be no personal liability against the makers of the notes and mortgage. But we are satisfied, from the whole evidence and all the circumstances in the case, that there was no sufficient evidence upon which the court could conclude and be satisfied by clear and convincing evidence that the writings as finally executed were not as intended; especially when we consider the circumstances surrounding the transaction. In the first place the notes and mortgage are clear upon their face. They contain no provision that the makers shall not be personally liable. As is stated above, the brother of the makers of the notes and mortgage was a lawyer. He examined the notes and mortgage personally. The notes were the usual printed form. A mere glance at the notes would show that there was no exception stated therein. If any interlineations appeared, or if any additions were made to the printed form, it would plainly show upon the face of the notes. Therefore, when the makers of the notes, who were intelligent people, accustomed to notes, glanced at them, they must have seen that there was no such exception as they now claim should have been inserted therein. It is unbelievable that a man or a woman of the intelligence of the makers of these notes could be deceived into signing them believing that there were exceptions therein which were not in ordinary notes. The record shows that, at the time the notes and mortgage were executed, the mortgagor Ed. Parker and the mortgagee, Samuel G. Moore, were present in the office of Fred Parker where the notes were drawn and prepared. Prior to the execution of the notes and mortgage, Mr. Moore stated that he desired to have his attorney examine the notes. He was then told, and this fact is conceded, that the notes and mortgage were in the usual form, and that he might take them to his attorney to be examined. Mr. Moore did so. His attorney examined them and corroborated what had been said. The notes and mortgage were then immediately returned to be executed.

Mr. Ed. Parker thereupon signed them, and subsequently they were executed by his wife, Julia A. Parker. Mrs. Parker was not present at the time Ed. Parker signed. She testified that, at the time she signed the notes and mortgage, she asked Fred Parker, her brother-in-law, if there would be any personal liability against her, and that she was informed that there would not be, and for that reason she signed the notes. This may be true. But this falls far short of showing that, at the time the notes and mortgage were executed, there was a mutual mistake; because, in order to be mutual, the mistake must have been made by both parties and not by one party to the instrument.

There are other circumstances which might be mentioned, but what we have said makes it unnecessary to mention them, because we are satisfied that, even if the oral evidence was evenly balanced and there were no other circumstances, in such case the court should not reform a written instrument. But in addition to the oral evidence, from the circumstance that the makers of these notes, by a simple glance at them, without even taking time to read them, must have seen and known that the notes were the ordinary printed forms and contained no changes or interlineations, they must necessarily have known, also, that the extraordinary exception such as they now contend for was not contained therein. As we have said above, the makers of these notes were intelligent people. They had dealt largely in notes and mortgages, and in real estate. Mr. Ed. Parker at least was acquainted with the forms of notes and mortgages and knew the effect thereof. We cannot think, in view of these circumstances, that there was any mutual mistake in the execution of the notes and mortgage.

The judgment of the trial court is therefore reversed, and the cause is remanded with instructions to enter a decree as prayed for in the complaint against both Julia A. Parker and Ed. Parker as makers of the notes and mortgage.

CROW, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

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Citations of Counsel.

[No. 12159. Department One. January 8, 1915.]

WILLIAM A. BLACKWOOD, *Respondent*, v. W. R. BALLARD
et al., *Appellants*.¹

BROKERS—COMMISSIONS—EFFICIENT CAUSE—EVIDENCE—SUFFICIENCY. Brokers are not entitled to commissions on a lease to customers originally found by them, but who were unable to meet the terms, where, after negotiations had ceased and the matter was abandoned, another agent took up the matter independently and effected a lease with such customers; since, of several brokers, the one whose effort was the efficient cause of the contract is entitled to the commissions.

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered December 19, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Bogle, Graves, Merritt & Bogle, for appellants. To the effect that an owner may discontinue dealings through one broker, and afterwards effect a sale or lease through another broker, or with the customer direct, where there is no question of bad faith, counsel cite: *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088; *Dore v. Jones*, 70 Wash. 157, 126 Pac. 413; *Parker v. Bruggemann*, 72 Wash. 309, 130 Pac. 358; *Ball v. Dolan*, 21 S. D. 619, 114 N. W. 998, 15 L. R. A. (N. S.) 272; *Naylor v. Ashton*, 20 Cal. App. 544, 130 Pac. 181; *Barney v. Yazoo Delta Land Co.*, 179 Ind. 337, 101 N. E. 96; *Butterfield v. Consolidated Fuel Co.* (Utah), 132 Pac. 559; *Leonard v. Eldridge*, 184 Mass. 594, 69 N. E. 337; *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294; *Cone v. Keil*, 18 Cal. App. 675, 124 Pac. 548.

Alexander & Bundy and *Adair Rembert*, for respondent. *Contra*, counsel cite: *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *Norman v. Hopper*, 38 Wash. 415, 80 Pac.

¹Reported in 145 Pac. 238.

551; *Grinnell Co. v. Simpson*, 64 Wash. 564, 117 Pac. 391; *Norris v. Byrne*, 38 Wash. 592, 80 Pac. 808; *Duncan v. Parker*, 81 Wash. 340, 142 Pac. 657.

MORRIS, J.—Action to recover a commission as broker, in procuring lessees for a term of fifteen years upon property belonging to appellants. Verdict for respondent for \$2,400, upon which judgment was entered, from which this appeal was taken.

The main error relied upon for reversal is that the evidence is wholly insufficient to support the verdict. The facts are about these: In January, 1913, appellants were the owners of a two-story building, on Second avenue, Seattle, which was held by one Friedenbergs, and his sublessees under a lease expiring January 1, 1916. Respondent and one Bock were real estate brokers, occupying a suite of offices with appellant W. R. Ballard. Respondent learned that two men named Vigelius and Marston desired to obtain a suitable location on Second avenue for a moving picture theater, and informed Bock of this fact. Bock suggested the building owned by appellants, and negotiations were immediately entered into with a view to obtaining a lease of these premises, Bock acting for appellants and respondent for the prospective lessees. During all these negotiations, all interested parties knew of the Friedenbergs lease, and that no lease could be obtained by Vigelius and Marston until satisfactory arrangements had been agreed upon between Friedenbergs and appellants; the ability of Friedenbergs to enter into any new arrangement depending also upon his ability to make satisfactory arrangements with his subtenants. During these preliminary negotiations, nothing was said as to the payment of any commission, nor did appellants know for whose benefit the new lease was to be obtained, except that, at one time, W. R. Ballard told respondent that he would pay something "if we get together on this proposition." About this time, Ballard was informed who the prospective lessees were. Negotia-

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tions continued, and when it looked as though they might be successful, Ballard inquired of Bock what commission he expected, and was informed that a commission of two and one-half per cent on the aggregate rentals for the term would be asked. This would amount to about \$12,000, and Ballard refused to consider the proposition further with such a demand, and tendered Bock a check for \$500 that had previously been handed him as evidence of good faith. Respondent was then called in, and some conversation was had relative to the payment of a commission, ending in Ballard taking back the check, and it was then agreed that the matter of the commission would be taken up later. The only evidence of any subsequent negotiations for a commission is found in the evidence to the effect that Ballard insisted on fixing the amount, and after some parleying, he offered \$2,400 as his outside figure, which respondent agreed to accept. Negotiations culminated in a written contract on February 24, 1913, between W. R. Ballard and Vigelius, as trustee, whereby \$19,500 was deposited with Ballard to be used in the purchase of the Friedenbergs lease, which being obtained, appellants were to lease the premises to Vigelius for a term of fifteen years, at a monthly rental of \$1,800 up to January 1, 1914, \$2,600 a month for the next nine years, and \$2,800 a month for the remainder of the term. Ballard then endeavored to buy the Friedenbergs lease and continued such endeavor until March 19, when Friedenbergs wrote him declining to further consider any proposition looking to the surrender of his lease. Ballard exhibited this letter to respondent and Vigelius, informing them that, on account of his inability to successfully treat with Friedenbergs the deal was off; returning to Vigelius and Marston the \$19,500 which they had deposited with him for the purpose of purchasing the Friedenbergs lease. It is apparent that all parties looked upon the refusal of Friedenbergs to surrender his lease as ending the matter, and nothing more was done, the complaint in fact reciting that the services of respondent and Bock term-

inated on or about April 1, 1913. Some days after this, Vigelius and Marston were introduced into the office of Henry Broderick, another real estate broker in Seattle, who sought to obtain for them a location on Second avenue, and busied himself with this endeavor for two or three months. In the meantime, Friedenbergr had gone to San Francisco leaving his business affairs in the hands of Broderick. The evidence discloses no further negotiations between any of the interested parties to this action.

Respondent, in support of his contention that negotiations continued, says that, at different times, he saw Vigelius and Marston in Ballard's office, and upon his approach they would cease their conversation; and that, on one occasion about April 1, while Ballard was ill at his home, respondent made an appointment for him to see Vigelius, and Vigelius kept the appointment. Vigelius and Marston say that, whenever they met Ballard, they conversed about the matter relative to the possibility of getting Friedenbergr to change his mind and surrender his lease, but that they considered the negotiations ended, and any subsequent reference was merely in the forlorn hope that something favorable might yet come out of it. Vigelius also says that, some time in March, Ballard told him that Broderick was Friedenbergr's agent, and that he thought he "was in a position to swing the deal." About the last of June, Friedenbergr returned from California, and shortly thereafter he called on Broderick, who told him that he knew parties he could interest in the moving picture business providing Friedenbergr could get a long time extension of the Ballard lease. Friedenbergr then went to Ballard and suggested he could form a corporation to take over the lease if it would be extended, to which Ballard acceded, and negotiations were then entered into between Friedenbergr and Ballard as to the terms etc. Friedenbergr had no knowledge, in so far as the record shows, that Vigelius and Marston had been negotiating with Broderick or that they were the parties Broderick had in mind when he first suggested the procuring of an ex-

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tension of his lease. Neither is it shown that Ballard had any knowledge that Vigelius and Marston were seeking a lease through Friedenbergs. Finally, on July 10, Ballard gave to E. H. Guie, acting for Friedenbergs, a lease for fifteen years at a rental of \$2,000 a month, except that the rental for each March during the term was fixed at \$1,500. Friedenbergs then bought out his subtenants, expending in such purchase the sum of \$22,500. Some misunderstanding then arose between Vigelius, Marston and Broderick, and the negotiations terminated. They were taken up again in a few days, resulting in an assignment to Vigelius and Marston of the Guie lease. There is no showing that Ballard had any knowledge of the relations between Broderick and Vigelius and Marston, or that he knew that the Guie lease had been assigned to Vigelius and Marston until long after. Bock and respondent, upon learning of this assignment, demanded a commission, which was refused. Bock then assigned his interest in the commission to respondent, and this suit was commenced, the complaint reciting, among other things, that it was agreed that Ballard would pay respondent and Bock a reasonable commission for their services in procuring the lease held by Vigelius and Marston under assignment from Guie, and that \$12,000 was such a reasonable commission.

These facts do not support the verdict, which must rest upon some proof as alleged in the complaint, that respondent and Bock were instrumental in procuring lessees of the Second avenue property who were ready and able to lease the premises upon terms satisfactory to appellants and who became such lessees. To support this allegation, it is further alleged that the lease of July 10 was made to Guie as trustee for Vigelius and Marston, and it is evident that there must be proof of facts supporting such an inference before the verdict can find adequate evidentiary support. There is none. The lease of July 10 was procured by Friedenbergs and taken in the name of Guie, as trustee for himself or a corporation he should subsequently organize. Guie was attorney for

Friedenberg, and was at all times acting for Friedenbergr and not for Vigeliug and Marston. There is absolutely no proof, nor is there a fact from which the inference can be drawn, that Friedenbergr or Guie at any time represented Vigeliug and Marston or was acting in their interest. The fact that Guie, as a result of the negotiations between Broderick and Vigeliug and Marston, subsequently assigned this lease to Vigeliug and Marston, is no proof that it was procured for the benefit of Vigeliug and Marston in the first instance.

The efforts of respondent and Bock to procure a lease for Vigeliug and Marston ceased after March 19. No better evidence of this fact is needed than the repayment of the \$19,500. It cannot be doubted but that all parties then considered the matter ended. There was an interim of three months in which no one was seeking to obtain a lease of this property for Vigeliug and Marston or any other person, and when Broderick interested himself in seeking a location for Vigeliug and Marston, he was acting independently of respondent and Bock, and confined his efforts to other property until a few days before the Guie lease was obtained. He then approached Friedenbergr with the suggestion that he had clients who were desirous of interesting themselves in a moving picture theater, and if Friedenbergr could obtain an extension of his lease from appellants, a mutually satisfactory arrangement could be entered into. Friedenbergr then interested himself in the matter, in consideration of the benefits that might flow to him from such a lease and not as the representative of Marston and Vigeliug, whom, as it has been before said, he did not know. The lease of July 10 is not the lease respondent and Bock were negotiating for. It is true that there are stipulations as to the character of the building etc., similar to those contained in the agreement of February 24. It needs but a glance at the terms of the rental proposed in the agreement of February 24 and those in the lease of July 10 to see that, under the agreement of February 24, appel-

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lants would have received many thousand dollars more in rent than under the lease finally made, and could well have afforded to pay respondent and Bock several times the amount demanded by them had they been successful in carrying out the lease as proposed in the contract of February 24. This, of course, is no reason why respondent cannot recover, for, if he had been instrumental in procuring lessees of appellants' property, no change in the terms of the lease finally made could deprive him of his right to compensation. All that he was required to do was to procure lessees who would lease the property upon terms satisfactory to appellants. But this respondent did not do. No efforts of his nor of his assignor culminated in any lease under any terms. They contributed nothing. They were in no sense the efficient cause of the lease of July 10. They induced neither appellants nor Friedenberg to enter into such a lease, and when they failed to negotiate a lease and realizing their failure ceased their efforts, they could not be said to be an efficient cause, because, through the instrumentality of other and independent causes, appellants made a lease of their property, even though such lease through assignment finally became the property of those whom respondent and Bock sought to interest. The controlling principles demanding reversal of this judgment are well set forth in *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088, and the cases there relied upon.

The only evidence referring to the sum of \$2,400, the amount of the verdict, was that this amount was finally promised by Ballard if the negotiations initiated by respondent and Bock and covered by the agreement of February 24 should terminate successfully. Respondent does not here contend that he has any cause of action based upon that promise, and is not now seeking to enforce it. Its only purpose in this case was evidentiary of the relations between Ballard and respondent and Broderick. It was not offered nor contended, either in the complaint or in fact, that it was any evidence

to guide the jury in arriving at the amount of recovery, if any.

The judgment is reversed, and since there is no evidence upon which it can rest, the motion for nonsuit should have been granted. Reversed, and remanded with instructions to dismiss.

Crow, C. J., Gose, PARKER, and CHADWICK, JJ., concur.

[No. 12164. Department One. January 8, 1915.]

I. M. GLADEN, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—INJURIES TO PEDESTRIAN—NEGLIGENCE OF CITY EMPLOYEES—EVIDENCE—SUFFICIENCY. Granting that a pedestrian was guilty of contributory negligence in crossing a wire, city employees reeling up the wire and knowing of his presence were bound to use a degree of care commensurate with the added danger; and whether they did so is a question for the jury, where it appears that the wire was held taut by a peavy stuck in the planking, that plaintiff started to cross the wire to board a street car, and was warned not to do so, and after waiting a short time, again started to cross, that the employee holding the peavy knew of his presence, and after he had allowed him to cross, the peavy gave way and plaintiff was caught in the snap of the wire.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 24, 1914, upon the verdict of a jury rendered in favor of a pedestrian injured through the work of removing city wires from poles in the street. Affirmed.

James E. Bradford, Frank M. Egan, and William B. Allison, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

CHADWICK, J.—A crew of city employees was engaged in removing a line of wire on Alki avenue, near its intersection

¹Reported in 145 Pac. 418.

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with East street, in the city of Seattle. The method employed was to loosen the wire from the top of one pole, pass it through a pulley or snatch block, about four feet from the base of the next pole, then carry it across the street car tracks to a plank roadway on Alki avenue, where it was passed around and held taut by a peavy, stuck in the planking and held by one of the workmen. The wire was then conveyed down Alki avenue some distance to a reel placed on a wagon. After the wire was released from the poles it was wound up on the reel. At the time plaintiff was injured, the peavy was nearly opposite a platform which had been erected for the convenience of persons boarding street cars. Plaintiff's home was on the opposite side of the street from where the work was being done. He came out of his house and started across the street with the intention of boarding a street car. He was about to cross the wire when one of the workmen warned him not to do so. Plaintiff went back to the sidewalk and waited a short time and again proceeded on his way. He had crossed the wire and was near the platform when the peavy gave way, releasing the wire. He was caught by the snap of the wire and thrown down. There is testimony tending to show that the one who held the peavy knew of plaintiff's presence. At the time the injury seemed trivial. At the trial, plaintiff, who was advanced in years, was in a bad mental and physical condition. The jury found that he had been injured by the negligence of the employees of the city, and a verdict was returned in his favor. The city has appealed.

Although several questions are raised in the briefs, all were waived at the time of argument except the one of contributory negligence on the part of defendant.

In determining the question of contributory negligence, the first duty of the court is to ascertain the proximate cause of the injury, to disassociate the proximate from the supervening and intervening causes and ascertain from the whole

mass of the testimony that circumstance or set of circumstances but for which the accident would not have happened. Having this duty in mind, it seems to us that the case is controlled by two very recent decisions of this court, *Pearson v. Willapa Const. Co.*, 72 Wash. 487, 130 Pac. 903, and *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941. In the first of these cases it is said:

"When a plaintiff by his own negligence has placed himself in a dangerous position where injury is likely to result, the defendant with knowledge of the plaintiff's danger is bound to use reasonable care to avoid injuring plaintiff; and where, by the exercise of such care, defendant could avoid the injury but fails to do so, the defendant's negligence becomes the proximate cause of the injury and renders him liable."

In the latter case:

"This court has held, in accordance with many courts and with what we conceive to be the more logical as well as the more humane rule, that where the peril of a traveler on the highway is actually discovered and should be appreciated by the operator of a street car, or other agency of danger, there arises a new duty to exercise all reasonable care to avoid injury, and the failure to exercise such care, if it results in injury, will render a defendant liable notwithstanding the continuance of the plaintiff's negligence up to the instant of the injury."

Granting that plaintiff was negligent in passing over the wire at the time and at the place he did, it is clear that the employees of the city, knowing of his presence, were put to a higher duty than first imposed and it was incumbent upon them to use a degree of care commensurate with the added danger in which plaintiff had placed himself. Whether the employees of the city used such reasonable care knowing plaintiff's peril, was for the jury. The question has been decided in his favor, and against the city.

Affirmed.

Crow, C. J., Gose, PARKER, and MORRIS, JJ., concur.

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[No. 12167. Department Two. January 8, 1915.]

JOHN E. OLSON, *Respondent*, v. G. A. CARLSON *et al.*,
Appellants.¹

APPEAL—REVIEW—ERROR INVITED BY APPELLANT. Appellant cannot urge as error instructions given by the trial court at appellant's request.

APPEAL—SUBSEQUENT APPEAL—LAW OF CASE. Where, upon a prior appeal, the supreme court held that substantially the same evidence was sufficient to raise a question for the jury, it became the law of the case and conclusive.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$11,500 for personal injuries is excessive, and should be reduced to \$8,000, where it appears that the plaintiff was a young man employed as a common laborer, and had never received over \$2 per day for his work; that, at the time of trial, he was engaged in light work at a wage of \$45 per month; that his injuries consisted in the dislocation of several vertebrae which in healing had united and caused some stiffness in the back, that his leg had been shortened about three-fourths of an inch by reason of a broken ankle, that he was in good shape considering the injury, and that, while the condition in which he was left was permanent, it would never get worse.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 28, 1914, upon the verdict of a jury rendered in favor of the plaintiff for \$11,500, in an action for personal injuries sustained by a common laborer in railroad construction work. Reversed unless \$3,500 is remitted.

Cannon, Ferris & Swan, for appellants.

Robertson & Miller and Corkery & Corkery, for respondent.

MOUNT, J.—This is the second appeal in this case. At the first trial, the court granted a nonsuit upon the motion of the defendants, and dismissed the case. Plaintiff appealed from the judgment then entered. Upon a review of the case,

¹Reported in 145 Pac. 237.

we concluded that the evidence was sufficient to take the case to the jury upon the principal act of negligence alleged, which was that the respondents had adopted an unsafe method for doing the work. For that reason, the case was reversed and remanded for a new trial. *Olson v. Carlson*, 74 Wash. 39, 132 Pac. 721. Upon a retrial, a verdict was rendered in favor of the plaintiff for \$11,500 and costs. The defendants have now appealed from that judgment.

Upon the retrial in the court below, the plaintiff practically abandoned the allegation of negligence to the effect that an insufficient number of men were furnished by the defendants for loading the timber which caused the injury to the plaintiff. When the court came to instruct the jury, an instruction was given submitting to the jury the question of the insufficiency of the men furnished to perform the work. This instruction was given as a requested instruction by the defendants. Upon a motion for a new trial, it was argued by counsel for the defendants that the giving of this instruction was error because that issue was not then in the case. The court thereupon called counsel's attention to the fact that the instruction had been given at the request of the defendants, and counsel then stated:

"I will stipulate in the record that my exception to the court's charge may be withdrawn because if it were put in inadvertently, or otherwise, we are going to stand by it and I shall make no objection to it here now, or in the supreme court for I don't think I should. I put it in inadvertently."

It is now argued by the appellants that this instruction was error. If error, it was concededly invited, for which the case will not be reversed.

It is next argued that the evidence was insufficient to justify the verdict. The law of the case was settled upon the other appeal. The evidence upon the question whether the defendants adopted an insufficient and unsafe method for loading the timber was held, upon the other appeal, to be sufficient to go to the jury. The evidence upon this question is

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substantially the same upon the last trial as it was upon the first. The decision in the other case, therefore, is decisive of the same question at this time.

It is finally argued that the verdict and judgment are excessive. We are satisfied that there is merit in this contention. The defendant himself testified that, at the time of his injury, he was earning \$2 per day, out of which he was paying his board which amounted to 75 cents per day. He further testified that, immediately after the first trial in January, 1912, he went to work again for the defendants at \$45 per month at light work, and that he had been earning that salary up to the time of the second trial. He further testified that his health was pretty good, except his back and his leg; that he limped and his back was lame; otherwise he enjoyed good health. One of the doctors who testified on behalf of the plaintiff stated that, while the injury was permanent, the plaintiff would never get worse; that, when the case was first tried, he was in excellent condition; that he was a strong, healthy boy and, considering the serious injury, he had gotten a good result. Another physician testified that, other than a limited motion in the back, the ankle was the principal injury; that, considering his injury, he is in good shape today; that he ought to be able to get along if he had no heavy weights to carry. Another physician testified on behalf of the plaintiff that the injury did not involve the spinal cord; that the plaintiff was able to lift probably as well as he could before the accident; that while the injury to the plaintiff was serious, dislocating three vertebrae in his back, which vertebrae in the process of healing had united and created a stiffness of the back, his principal injury was a broken ankle, which shortened his leg about three-fourths of an inch, and caused him to walk partially upon the side of his foot, resulting in what is called "flat-foot."

In the case of *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476, where the injury consisted of

a shortening of one of the plaintiff's limbs, a verdict of \$6,750 was held excessive and was reduced to \$5,250.

In *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651, the plaintiff sustained a crushed ankle and foot resulting in permanent injury fully as much as in this case. The verdict in that case was reduced from \$6,375 to \$4,000.

In *Rangnier v. Seattle Elec. Co.*, 52 Wash. 401, 100 Pac. 842, where the plaintiff received an injury which resulted in the amputation of one of his legs three or four inches above the ankle, where he had an earning capacity of \$200 per month, a verdict for \$9,500 was held excessive, and was reduced to \$6,000.

In *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208, where the plaintiff was twenty-six years old, a common laborer, and received an injury to the spine which was probably permanent, we held that \$3,800 was not excessive.

In *Johansen v. Pioneer Min. Co.*, 77 Wash. 421, 137 Pac. 1019, this court upheld a verdict for \$18,000. But in that case the plaintiff before his injury was capable of earning \$4 per day and his board and lodging. He was severely crushed and injured. He was rendered entirely helpless and incapable of ever earning anything for himself.

In *Gemmaux v. Northwestern Imp. Co.*, 72 Wash. 268, 130 Pac. 495, we upheld a verdict for \$18,000. But in that case the plaintiff was capable of earning on an average of \$4 per day. His left leg was atrophied and almost completely paralyzed, and he was left in a "helpless and hopeless condition."

The injuries and results in the last two cases were far greater than the injuries and results to the respondent in this case. While it is difficult for this court to determine the exact amount of damages which ought to be awarded in a cause of this kind, it is at once apparent that the verdict is excessive. The earning capacity of the respondent in this case has never been greater than \$45 per month. His earning capacity may be reduced to some extent. But the evidence

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shows that, for at least a year prior to the last trial of the case, he had earned more than he was earning previous to his injury or at the time of his injury. While his injury may be permanent, and he may endure some suffering because thereof, he is not helpless. We are satisfied that the verdict and judgment are excessive. For this reason the cause will be remanded for a new trial unless the plaintiff, within 30 days from the filing of the remittitur in the lower court, shall remit from the judgment and verdict the sum of \$3,500. If such remission is filed, the judgment will stand affirmed for \$8,000.

CROW, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12179. Department One. January 8, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. W. C. WILSON,
Appellant.¹

PERJURY—ELEMENTS OF OFFENSE—DEGREES—STATUTORY DEFINITIONS. "Perjury in the second degree" as defined by Rem. & Bal. Code, § 2353, covering oral or written false swearing concerning any matter whatsoever whether as a volunteer or in a proceeding or investigation authorized by law, is not included within, and conviction thereof cannot be had under, a charge of perjury under Id., § 2351, defining perjury in the "first degree" as knowingly testifying falsely concerning material matters in any action, proceeding . . . or investigation in which an oath may be lawfully administered (covering the crime of willful and corrupt perjury at common law as an "obstruction of justice"), in which there can be no shades or degrees of the offense.

SAME—DEFENSES—MATERIALITY OF FALSE TESTIMONY. Rem. & Bal. Code, § 2352, providing that it shall be no defense for "perjury in the first degree" (common law perjury, as to material matters under Id., § 2351) that the defendant did not know the materiality of his false statement if it was indeed material and might have affected such proceeding, does not contemplate that, if the testimony be material to the issue, the offense would be perjury in the first degree, and, if not material, "perjury in the second degree" (false swearing concerning any matter whatsoever, under Id., § 2353).

¹Reported in 145 Pac. 455.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for perjury, where the state has introduced evidence tending to show that defendant had made defamatory statements in a spirit of malice toward the prosecuting witness, defendant is entitled to introduce evidence denying or explaining away the alleged statements.

SAME—INSTRUCTIONS. Where the court, in a prosecution for perjury, has instructed the jury that every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false, qualifying it by further instructing that, in order to find the defendant guilty, they must find that he willfully gave the testimony knowing the same to be false and untrue, that intent is the basis of every moral action, and that the words "knowingly and willfully" mean with a criminal intent, it was not error to refuse a requested instruction covering honest belief, reasonable ground for believing his testimony to be true, evident forgetfulness, and lack of intent to willfully testify falsely.

Appeal from a judgment of the superior court for Okanogan county, Claypool, J., entered February 2, 1914, upon a trial and conviction of "perjury in the second degree." Reversed.

William C. Brown, for appellant.

J. W. Faulkner, Chas. A. Johnson, and Neal & Neal, for respondent.

CHADWICK, J.—Appellant is charged by information with the crime of perjury in the first degree. A further statement of the charge is unnecessary to the determination of the case in this court. After a trial, appellant was convicted of the crime of perjury in the second degree. A judgment upon the verdict was rendered and defendant was sentenced to imprisonment in the state penitentiary for a term of not less than six months nor more than two years.

Numerous errors are assigned, but few of them will require discussion in this court.

The court instructed the jury that an information charging perjury in the first degree includes the lesser crime of perjury in the second degree, and if the jury found to their satisfaction and beyond a reasonable doubt that all of the essential

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elements of the crime charged had been proven, except the materiality of the testimony charged to have been falsely given, the defendant would be guilty of the crime of perjury in the second degree, and that it should find accordingly.

At common law, the crime of "willful and corrupt perjury" is defined by Sir Edward Coke to be, "a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question." 4 Black. Com. 137, 3 Inst. 164.

"Perjury by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." Bac. Ab. Tit. Perjury.

See, also, 1 Russell, Crimes (Int. ed.), p. 293.

"Perjury, not speaking of its affinities, is the wilful giving under oath, in a judicial proceeding or other course of justice, of false testimony material to the issue or point of inquiry." 1 Bishop, New Criminal Law, § 468 (4).

False swearing in any proceeding other than in a court of justice was not taken account of as a crime at common law. Perjury, however, was noticed and punished solely upon the theory that a false oath was "an obstruction of justice."

At common law, the false oath "must be taken either in a judicial proceeding of the like nature, wherein the King's honour or interest are concerned." 1 Russell, Crimes (Int. ed.), 294.

"The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution; for it esteems all other oaths unnecessary, at least, and therefore will not punish the breach of them." 4 Blackstone, Commentaries, p. 137.

"In the case of perjury, I take the circumstances requisite to be these; *the oath must be taken in a judicial proceeding,*

before a competent jurisdiction; and it must be material to the question depending." Lord Mansfield in *Rex v. Aylett*, 1 Term Rep. 63.

Our legislature has defined perjury:

"Every person who, in any action, proceeding, hearing, inquiry or investigation, in which an oath may lawfully be administered, shall swear that he will testify, declare, depose or certify truly, or that any testimony, declaration, deposition, certificate, affidavit, or other writing by him subscribed is true, and who in such action, proceeding, hearing, inquiry or investigation shall state or subscribe as true any material matter which he knows to be false, shall be guilty of perjury in the first degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years." Rem. & Bal. Code, § 2351 (P. C. 135 § 197).

This statute is clearly no broader than was the common law, and must, when considered in the light of other statutes, be held to apply in all cases where the alleged false oath is taken and testimony is given in or in aid of a judicial proceeding. Courts and legislatures have recognized that perjury, as defined at common law and by statute, is not only complete within itself, but is exclusive of other offenses against the truth. Consequently the legislature of this state and of other states have passed many special statutes and many general statutes making certain offenses perjury that would not be so either under the common law or under the statute, for crimes are not to be created by construction. If there be a reasonable doubt as to the law, justice demands that it be resolved in favor of innocence of the party charged. *State ex rel. Dorrin v. Hazeltine*, 82 Wash. 81, 143 Pac. 436; *State v. Furth*, 82 Wash. 665, 144 Pac. 907.

An evidence of the legislative intent to reflect this principle in its work may be found in statutes making the following offenses perjury; any wilful, false swearing in any bank examination (§ 3300); the taking of a false oath when registering for voting in a school district of the first class (§ 4702); false statements by candidates at primary elec-

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tions (§ 4835); the swearing in of an illegal vote at an election (§ 4838); a false sworn statement under the sales in bulk law (§ 5298); a false oath in procuring marriage licenses (§§ 7164, 7165); a false oath to support the registration of a land title under the Torrens act (§ 8898); a false listing of property for taxation (§ 9130). These offenses, in the absence of a special statute, would not be punishable under § 2351.

Section 2351 was passed in 1909. At the same time and as a part of the same act, the legislature passed a general statute, which, as counsel states, and so far as we know, is unknown to the law of any other state. It is an original conception so far as the law of this state is concerned.

“Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree and shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year.” Rem. & Bal. Code, § 2353 (P. C. 135 § 201).

Section 2351 defines a felony. Under § 2353, one may be punished as for a felony or a misdemeanor, as the trial judge may determine.

It is the contention of the state that, in so far as perjury may be committed, “in a proceeding or investigation authorized by law,” perjury in the second degree is included in a charge of perjury in the first degree. We cannot assent to this reasoning. If it were so, the legislature has done a vain and useless thing. The adoption of § 2353 would serve no purpose and lead only to irreconcilable conflict and confusion, for if both sections can be made to apply to the same state of facts and cover any and “all proceedings or investigations authorized by law,” and these words include a civil “action” (§ 2351) or a proceeding in a court of justice or in furtherance of its jurisdiction and its functions, any convicted

person could contend for a sentence under the misdemeanor clause of § 2353. Thus a false oath taken in a court of justice, which from the earliest times has been held in disfavor and contempt—it was called “willful and corrupt” perjury at common law—and punished by the severest penalties, would be reduced to a misdemeanor if the judge pronouncing the sentence so willed.

We cannot believe that the legislature ever intended such consequences, but rather, by adopting § 2353, it meant to cover those offenses against truth which occur in extra judicial proceedings and investigations and proceedings and investigations held by *quasi* judicial boards, commissions and committees where a false oath could not be held to be perjury under the theory that it operated as an “obstruction of justice” as the stream of justice flows in the courts of the state, or in proceedings ancillary or in aid of the jurisdiction of the courts to try and determine public and private controversies. “Proceedings or investigations authorized by law,” must be held to mean proceedings or investigations defined by or held under the warrant of the legislative body as distinguished from an offense recognized as criminal at the common law, which is adopted in so far as it is not inconsistent as an integral part of our criminal code.

It is evident that § 2353 was passed to cover, by general statute, offenses which in some states have been called false swearing and made punishable *eo nomine* by statute. 2 Bishop, New Criminal Law, 1014. No other construction can be given to § 2353, for from the very nature of things there can be no shades or degrees in the crime of perjury when committed in a court of justice. Neither the common law nor the statute makes any distinction between a black lie and a white lie. If either is wilfully false and material to the issue, it is perjury.

If a convicted man is entitled to consideration it may be given him, for the judge has a wide discretion. He may meet and measure any extenuating circumstance or circum-

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stances when passing sentence. But the crime, if committed, is complete when a person takes an oath and wilfully testifies as the truth that which he knows to be false.

The perjury alleged to have been committed in this case occurred in an *action* in which an oath was lawfully administered. In such cases "every person . . . shall be guilty of perjury in the first degree" (§ 2351).

Counsel contend that the judgment of the court may be sustained upon the theory that, if the testimony be material to the issue, the offense would fall within § 2351, and if not material, under § 2353. The answer to this contention is that the statute makes no such distinction. Counsel have misread § 2352. That section does not provide that testimony given under the one section if material shall be perjury in the first degree, and if not material to the issue shall be perjury in the second degree. It says that it shall be no defense for perjury in the first degree that the defendant did not know the materiality of his false statement, if it was indeed material and might have affected such proceeding. The statute goes not to the materiality of the testimony, but to the mental status of the person giving the testimony.

Nor can the verdict and judgment be sustained upon the theory that perjury in the second degree is a crime included within the definition of perjury in the first degree. We have already held that there can be no degrees of guilt when the false oath and materiality of the testimony has been established. The offender is either guilty or he is not guilty. Furthermore, we have held that lesser crimes are not to be included, nor are compromise verdicts to be invited, unless demanded by the plain provision of a statute, or the facts developed at the trial bring the case within the definition of the lesser crime. *State v. McPhail*, 39 Wash. 199, 81 Pac. 688; *State v. Kruger*, 60 Wash. 542, 111 Pac. 769; *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43; *State v. Harsted*, 66 Wash. 158, 119 Pac. 24;

State v. Ash, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; *State v. Hart*, 79 Wash. 225, 140 Pac. 321.

We shall not make a close argument upon the remaining assignments of error except to say that, in the event of a retrial, if the state introduces evidence tending to show that the defendant had theretofore made defamatory statements in a spirit of malice and ill-will toward the prosecuting witness, the defendant should be given a like opportunity to deny or explain away the alleged statements. 2 Bishop, New Procedure, § 935; 30 Cyc. 1444.

Appellant requested an instruction covering honest belief, reasonable ground for believing his testimony to be true, evident forgetfulness, and lack of intent to wilfully testify falsely. The court, when instructing the jury, told them that "every unqualified statement of that which one does not know to be true, is equivalent to a statement of that which he knows to be false." It is complained that the court did not instruct the jury that this statutory definition should be taken with the qualification that there must be a criminal intent, an absence of honest belief or honest mistake. On the other hand, it is contended that the court covered this objection by instructing the jury that, in order to find the defendant guilty, they must find that he wilfully gave the testimony knowing the same to be false and untrue. The court instructed the jury that intent is the basis of every moral action, and the words knowingly and wilfully mean with a criminal intent. We are not prepared to say that the instruction of the court did not meet the full intendment of the law.

Other assignments of error are made but the matters discussed will not be material or are not likely to occur upon a retrial. For the reasons assigned, the judgment of the lower court is reversed.

Remanded for a new trial.

CROW, C. J., GOSE, MORRIS, and PARKER, JJ., concur.

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Opinion Per MOUNT, J.

[No. 12197. Department Two. January 8, 1915.]

C. W. BICKFORD, *Respondent*, v. FRED R. HUPP, *Appellant*.¹

TROVER AND CONVERSION—CONSTRUCTIVE POSSESSION OF DEFENDANT. Where goods of plaintiff and defendant were stored together in a warehouse, a subsequent sale by the defendant of the goods of both parties to a third person, and removal by the latter, was a conversion, as the sale by defendant constituted a constructive possession and assumption of ownership on his part.

COMPROMISE AND SETTLEMENT—EVIDENCE—QUESTION FOR JURY. In an action to recover the value of certain goods alleged as converted by defendant to his own use, in which the defendant set up a compromise and settlement, a question for the jury was presented where defendant claimed the settlement covered payment for the goods and plaintiff testified that the money paid him by defendant was merely for the contract price of certain construction work and that the goods were not taken into consideration in the settlement.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Error in not striking a deposition of a witness showing a sale of plaintiff's goods by defendant was harmless, where such sale was conceded on the trial by defendant.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 28, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed.

Peacock & Ludden, for appellant.

Alex M. Winston, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover the value of certain goods alleged to have been converted by the defendant. The answer of the defendant consisted of a general denial; and also an affirmative defense to the effect that, prior to the date the property was alleged to have been sold by the defendant, a settlement was had between the plaintiff and the defendant; that the defendant had paid the plaintiff a certain sum of money in satisfaction

¹Reported in 145 Pac. 454.

of all claims and demands. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff. The defendant has appealed.

At the close of the plaintiff's evidence the defendant moved the court for a nonsuit on the grounds, first, that the evidence failed to show a conversion, and second, that the evidence of the plaintiff showed a final settlement. Upon the trial of the case, the plaintiff testified in substance, that he was the owner of the goods alleged in his complaint to have been converted by the defendant; that he had stored these goods at a warehouse in Copperfield, Oregon, with certain goods of the defendant; that thereafter the defendant, without the knowledge of the plaintiff, sold the goods in the warehouse to a firm known as Bates & Rogers Construction Co.; that this company had afterwards moved the goods away. The plaintiff also testified as to the value of the goods. He also testified that, at a certain time after the storing of the goods and before he knew of the sale thereof, he had made a settlement with the defendant for the amount due him for certain contract work which he had performed for the defendant. He also testified that, at the time of this settlement, the property stored in the warehouse at Copperfield was not considered and did not form a part of the settlement for moneys due under the contract.

It is contended by the appellant that there could be no conversion of the goods under this statement of facts; and that the rule is that the defendant could not be charged with conversion of goods unless he had actual or constructive possession of them at the time of the alleged conversion. If this is the rule, we are satisfied that, under the evidence, the defendant, at the time he sold the goods, assumed constructive possession. If the goods belonged to the plaintiff and were stored by him in a warehouse, and afterwards were sold by the defendant to a third person, who removed them, this was clearly a conversion. In the case of *Ramsby v. Beezley*, 11 Ore. 49, 8 Pac. 288, that court says:

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"Of the different ways by which a conversion of personal property may be effected, one is, where a party sells the property of another without his authority or consent. Such sale is the assumption of ownership, of dominion over, or right to control the property, inconsistent with, and in denial of the rights of the true owner. Hence it is said, 'Every assuming by one to dispose of the goods of another is a conversion.' (Trover, Bacon's Abridg. 681.) Or 'the assumption of authority over property, and actual sale, constitutes a conversion.' (*Gillman v. Hill*, 36 N. H. 324.) No actual force need be used, (*Gibbs v. Chase*, 10 Mass. 128,) nor any manual taking or removal of the property, (*Reynolds v. Shuler*, 5 Cow. 326; *Connah v. Hale*, 25 Wend. 465,) nor proof that the defendant had actual possession of the property, (*Farnell v. Chase*, 37 Maine 290,) for, in the language of Shepley, C. J.: 'The exercise of such a claim of right, or dominion over the property as assumes that he is entitled to the possession, or to deprive the other party of it, is a conversion.'"

We are satisfied, therefore, that if the plaintiff's evidence is to be believed, there was a conversion.

It is also argued that there was a settlement between the parties. It is no doubt true, if this settlement took into consideration these goods, that the plaintiff is not entitled to recover. But, if his statement is true that these goods were not taken into consideration, but that the settlement was only for the contract price of certain construction work, then he is entitled to recover, if the defendant sold his goods and delivered them to a third party. These were both questions for the jury under the evidence in the case.

It is also claimed by the appellant that the court erred in not striking a certain deposition. There was no prejudicial error in this, because it was conceded, as we understand the record, that the goods for which the plaintiff was allowed to recover were sold by the defendant. The testimony of this witness related only to that subject.

Several assignments of error are made upon the instructions. But these are apparently not relied upon. The court

very clearly, fairly, and fully instructed the jury with reference to the law of the case. We think it is unnecessary to review these instructions. We find no error in the record.

The judgment is affirmed.

CROW, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12207. Department One. January 8, 1915.]

JOHN A. BAYER *et al.*, *Appellants*, v. MARTHA E. BAYER
et al., *Respondents*.¹

EXECUTORS AND ADMINISTRATORS—NONINTERVENTION WILL—DISTRIBUTION OF ESTATE—JUDGMENT—CONCLUSIVENESS. Under Const., art. 6, § 4, giving the superior courts general jurisdiction, including all matters of probate, and Rem. & Bal. Code, § 1444, providing that estates under nonintervention wills "may be managed and settled without the intervention of the court" (subject to supervision by the court if the trust is not faithfully performed), without denying the right of the executor of such a will to go into court to have it construed, the superior court has jurisdiction to entertain an application by the executor for an order of distribution of the estate which was in effect a construction of the will and within its general jurisdiction, in view of a trustee's right to maintain an action for directions, and the power of the court to direct and control trusts.

SAME—JURISDICTION OF COURTS. An executor under a nonintervention will, under which it is not necessary to take out letters, is in fact a trustee and derives his powers from the will and not from the court.

CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF SERVICE—APPEARANCE. A decree of general distribution invoked by the executor of a nonintervention will, and entered in probate upon notice to a guardian *ad litem* conformably to the statute and to the order of court, to which the guardian personally appeared in the action, is upon due process of law and conclusive the same as any other judgment.

JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK. A judgment or decree of a court of competent jurisdiction cannot be set aside by a court of coordinate jurisdiction, the power to vacate judgments being entirely different from the power to reverse them; and the relief must be sought in the court where the judgment was entered.

¹Reported in 145 Pac. 433.

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Opinion Per GOSE, J.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered April 2, 1914, upon findings in favor of petitioner and plaintiff, in consolidated actions to vacate decrees of distribution and partition and for money had and received, tried to the court. Reversed.

Reynolds, Ballinger & Hutson, for appellants.

James R. Chambers, for respondents.

GOSE, J.—In this case two actions were consolidated. The first was brought by petition in the superior court of Lincoln county. The object of the action was (a) to vacate a decree of distribution entered in the superior court of King county upon a nonintervention will, and (b) to vacate a decree of partition entered in the superior court of Lincoln county following the decree of distribution. A second action was brought in the same court to recover the value of a quantity of grain grown upon the land in controversy. Martha E. Bayer was the petitioner in the first action and the plaintiff in the second action. She recovered in both cases in the court below, and this appeal followed.

The salient facts are these: Frederick A. Bayer died testate in King county, where he then resided, on the 8th day of December, 1908. His will bore date December 2, 1908. He named Fred Eidemiller as executor of his will. In his will he declared, item 1, "that all real and personal property in my possession or standing in my name in the state of Washington is the community property of myself and of Martha E. Bayer, my wife; and that all property standing in my name in the state of Oregon is my separate property, subject, however, to my wife's dower rights as prescribed by the statutes of the state of Oregon;" item 2, "I do hereby confirm in my said wife her said community and dower interests aforesaid, and do direct that in the settlement of my estate her said community and dower interests be set apart to her. All the remainder and residue of the

property, both real and personal, in my possession or standing in my name at the time of my death, I hereby give, devise, and bequeath to my brothers, John A. Bayer . . . Samuel B. Bayer . . . and my sisters, Kate Bayer . . . and Laura H. Eidemiller . . . it being my intention that my said wife shall receive and retain her community and dower interests . . . all my estate remaining after the setting apart of said interest of my wife, shall be divided equally between my brothers and sisters aforesaid." The will directs that no bond shall be required of the executor, and provides that the estate shall be settled by the executor without recourse to any court except for the purpose of proving the will, "hereby conferring upon said executor full power and authority to settle and distribute my said estate in accordance with this my will without interference from any court."

The will was proven and admitted to probate in the superior court of King county on the 12th day of December, 1908. J. N. Dotson was appointed guardian of the person and estate of Martha E. Bayer, then insane, in the superior court of King county on the 31st day of December following. Dotson, who is a brother of Mrs. Bayer, remained guardian of her person and estate until the 28th day of July, 1913, at which time Mrs. Bayer was adjudged sane. On January 6, 1909, an order was entered in the superior court of King county, directing a publication of notice to creditors. On the 20th day of January, 1909, a homestead was set aside to Mrs. Bayer and an allowance was made for her support upon the petition of her guardian, by an order duly entered in the same court. On February 9, the executor filed an inventory wherein all the property in controversy was classified as community property. On February 26, the estate was duly adjudged to be solvent. The order recites "that said estate may be managed and settled without the further intervention of this court." On April 23, an order was entered adjudging that due notice had been given to

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creditors. On June 30, the guardian filed a petition for an advance of \$400 to be charged to the distributive share of the estate of his ward. The petition alleges that all the property of the deceased and Martha E. Bayer, both real and personal, was community property. On the same day an order was entered directing an advance of \$400 to the widow. On October 23, the executor filed a petition for authority to lease all the real property of the estate for one year. The guardian united in the petition. An order was thereupon entered directing a lease of the property. On February 1, 1910, the executor filed his final account and petition for distribution of the estate, in which he described all the property of the estate, real and personal. The petition alleges that all the property, both real and personal, including the rents, issues, and profits of the real estate, is community property, and that the widow's distributive share of the estate is an undivided one-half. On March 8, after due and legal notice of the hearing had been given conformably to the statute and the order of the court, a decree of settlement and distribution was entered.

The decree adjudges that due notice was given of the time and place of settlement. It recites the appearance of the executor in person and by his attorneys, and the appearance of J. N. Dotson as guardian of the person and estate of Martha E. Bayer, in person and by his attorneys. It recites that the account contains "not only the condition of the account and of the separate estate of Frederick A. Bayer, deceased, but also of the estate of the community of Frederick A. Bayer, deceased, and Martha E. Bayer, his wife." It adjudged that the final account was true and correct except as to one item of \$280.75, which it reduced to \$40.75. The decree recites "that said estate consists wholly of the community property of decedent and his said wife." It described the property of the estate as it was described in the petition for distribution. It distributed the real property, an undivided one-half to the widow, "the same being in satisfaction

of her community interest in said property," the remaining undivided one-half to the brothers and sisters named in the will, in equal shares; that is, an undivided one-eighth to each thereof. It divided the personal property in the same proportions. There is nothing in the record which shows that any person at any time questioned the jurisdiction of the court to settle the estate.

The real property comprises two and one-half sections of land in Lincoln county. Nine hundred and sixty acres, which are referred to as "the big farm," are claimed by the widow to be community property. Section four she claims as her separate property, and the trial court found in harmony with this view. The trial court also found that the judgment of the superior court of King county is "absolutely void," and vacated it, and also vacated the decree entered in the partition proceedings in the superior court of Lincoln county, and divided the personal property on the same basis as the real estate; that is, on the theory that nine hundred and sixty acres were community property and section four was the separate property of the widow.

The crucial question is, Is the decree of distribution entered in the superior court of King county void? The constitution, art. 6, § 4, provides that the superior court shall have jurisdiction in all cases in equity, in certain cases at law, and in "all matters of probate." Rem. & Bal. Code, § 1444 (P. C. 409 § 283), provides that in nonintervention wills, where it appears to the court by the inventory filed and other proof that the estate is solvent, which fact may be established by an order of the court on the coming in of the inventory,

"It shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory, all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so pro-

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vide: But provided, that in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court for good cause shown, for a reasonable time."

This section further provides that, if the party named in the will shall fail to execute the trust faithfully, it shall be the duty of the court of the county wherein the estate is situated to cite the executor to appear before the court upon the petition of a creditor of the estate, or of any of the heirs, or of any person on behalf of any of the heirs. It further provides that, if upon such hearing it shall appear that the trust in the will is not faithfully discharged and that the parties interested or any of them have been or are about to be damaged thereby, letters testamentary or of administration shall be had, and that all other matters and proceedings shall be had and required as are now required in the administration of estates.

Under the constitution, the superior court is a court of general jurisdiction. It has jurisdiction of equity cases, actions at law, and proceedings in probate. It has been held that, under the statute to which reference has been made, the executor derives his powers, not from the court, but from the will, and that he is in fact a trustee. *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337. It has also been held that a court sitting in probate may settle issues and try a case as any other civil cause. *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Sloan v. West*, 63 Wash. 623, 116 Pac. 272. The constitution does not make the superior courts probate courts. On the contrary, it makes them courts of general jurisdiction including "all matters of probate." As a court of general jurisdiction, it has the power to construe wills at the suit of proper parties. *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502. A decree of distribution, entered upon notice of publication in harmony with the statute, Rem. & Bal. Code,

§§ 1499, 1500, and 1589 (P. C. 409 §§ 395, 397, 595), is upon due process of law and conclusive, the same as any other judgment. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Pac. 990; *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492; *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

In the *Noyes* case, we said:

"The decree [of distribution] was in itself a construction of the will."

In *In re Bell's Estate*, we said:

"Probate matters in this state are referred to the superior court, a court of general jurisdiction, and its jurisdiction in probate may be submitted to in the same manner and is entitled to the same presumptions in its favor as its jurisdiction in any other class of cases."

In *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147, we said:

"When a superior court has presented to it through a petition, in any matter of probate, any issue touching the estate, it has jurisdiction both of the parties and of the subject-matter, and it deals with them not as a court of limited, but of general, jurisdiction. It may exercise all of its powers, legal or equitable, and may even invoke the aid of a jury to finally determine the controversy. The constitution has no more limited its powers in such cases than in others of which jurisdiction is conferred by the same constitutional provision."

In *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 139 Pac. 650, we said:

"Jurisdiction is the power to hear and determine. The superior court is a court of general jurisdiction. The court had jurisdiction of the estate, and one of the incidents of that jurisdiction was the power and duty to determine who shall take the estate. The relator was before the court, both in person and by counsel. Hence the court had jurisdiction of the parties."

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A trustee may maintain a suit in equity for directions "as to the particular course which he ought to pursue," and if he follows directions, he will be released from responsibility. 3 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1064, 1153, 1156.

In 18 Cyc. at page 208, it is said:

"It is always the right and frequently becomes the duty of an executor or administrator to apply to the courts for direction and guidance in the performance of the duties of his trust, and the courts have jurisdiction to direct and control his acts in the premises."

See, also, *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025.

"A voluntary appearance" of a defendant is equivalent to a personal service of the summons upon him. Rem. & Bal. Code, § 238 (P. C. 81 § 169). In the case at bar, the guardian was given notice of the time and place of the hearing of the final account and the petition for the distribution of the estate conformably to the statute and to the order of the court, and he personally appeared in the action. In *In re Bell's Estate*, we said:

"The only purpose of notice in any case is to give an opportunity to be heard. They not only had notice, but appeared and asked for a continuance and afterwards stipulated for the hearing. We think that action must be held to constitute a general appearance to the petition, and that they were before the court for all purposes."

In that case one of the parties who appeared was the guardian *ad litem* of a minor heir. A nonintervention will was not involved in any of the above cases.

The judgment or decree of a court of competent jurisdiction cannot be set aside by a court of coordinate jurisdiction. *Case Threshing Machine Co. v. Sires*, 21 Wash. 322, 58 Pac. 209.

"The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power

inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made. As between courts of coordinate jurisdiction, such as two county courts or circuit courts of the same state, the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face; relief must be sought in the court where the judgment was entered." 1 Black, Judgments (2d ed.), § 297.

See, also, 17 Am. & Eng. Ency. Law (2d ed.), page 842; *Missouri Pac. R. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338.

The respondent, in support of her contention that the decree of distribution entered in the superior court of King county was without jurisdiction and hence void, has cited *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041; *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641; *State ex rel. Cox v. Superior Court*, 21 Wash. 575, 59 Pac. 483; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025; *In re McDonald's Estate*, 29 Wash. 422, 69 Pac. 1111; *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24; *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721, 70 Pac. 138; *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137.

Fulmer v. Gable is not in point. In *State ex rel. Cox v. Superior Court*, it was held that a creditor of devisees under the will could not bring the executors of a nonintervention will into probate court upon a charge of mismanagement, under the provisions of the statute. In *In re McDonald's Estate*, it was held that an order of discharge of an executrix and a decree of distribution, where the executrix was acting under a nonintervention will, was without jurisdiction. The decision was *obiter*, however, as the executrix had ineffectually pleaded her discharge in the Federal court and had not appealed from an adverse judgment. In *Moore v. Kirkman*, it was held that notice given to creditors by the executors of a nonintervention will had no legal efficacy. In *English-McCaffery L. Co. v. Clowe*, all the property, both

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real and personal, was devised and bequeathed to a daughter and a son of the testator in equal shares, by the terms of a nonintervention will. The daughter was named as the sole executrix. After the due probate of the will, the daughter conveyed all her right, title, and interest in the real estate in controversy to her brother and co-devisee, who later sold and conveyed the property to the defendants for a valuable consideration. After both deeds were filed for record, the executrix, under an order of court, sold the property to the plaintiff. The sale was confirmed. It was held that the judicial sale was ineffectual; that the title had theretofore passed from the estate to the defendant for a valuable consideration, and that the plaintiff "had full knowledge of all these facts and was a participant in their invalidity." In *Peck v. Peck*, it was held that an action will lie to quiet title where a nonintervention will is invoked as a muniment of title, the same as where the title is predicated upon any other instrument. In *In re Guye's Estate*, the executors named in the will accepted the trust, and thereafter took such steps as were necessary under the statute to establish their right to manage and settle the estate without the intervention of the court. After this had been done, the widow petitioned the court before whom probate proceedings were had for an allowance out of the estate, and sought to bring the executors before the court. It is true that we there said that the court was without jurisdiction. We also said:

"The statute authorizing such a will has been on the statute books since early territorial days, and has uniformly been construed to confer upon the executors of a will drawn pursuant to its provisions the right to execute the trust without interference on the part of the court,"

except upon the happening of some one or more of the contingencies expressed in the statute.

In each of the cases relied upon by the respondent, except *In re McDonald's Estate*, it was sought to require the executor or trustee named in the will to take specific action. The

statute itself provides, "Such estates *may be* managed and settled" without the intervention of the court. It does not provide that they *must* be managed by the executor without the intervention of the court. There is nothing in the statute which prevents an executor from invoking the jurisdiction of the superior court, whether it be called the equity or probate jurisdiction, if he deems it expedient to do so. He cannot be compelled to come into probate court at the suit of a third party, except upon the happening of some contingency expressed in the statute. In the case at bar, we have no doubt that the executor had a right under the peculiar provisions of the will to go into the superior court and have it construed. The fact that the proceeding was entitled in probate does not militate against this right. It will be presumed that the court sitting in probate entered the same order that it would have entered had the proceeding been brought upon the equity side of the court. Nine hundred and sixty acres of the real estate stood of record in the name of Frederick A. Bayer. Section four, which the respondent claims as her separate property, stood of record in the name of "Martha E. Bayer and husband." The executor believed that all of the estate was community property, and he had a right to go into court and have that fact determined by a court of competent jurisdiction, and when it was so determined, the guardian having appeared after due notice, the judgment was final and conclusive against an attack in a court of coordinate jurisdiction. The point we desire to emphasize is that there is a marked difference between a proceeding by a third party to require the executor of a non-intervention will to come into probate court, and a proceeding by the executor himself invoking the jurisdiction of such court. We think that, under the constitution and the statute, the judgment of the superior court of King county was not void, and it follows that it could not be vacated by a court of coordinate jurisdiction.

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Statement of Case.

We do not understand that it is claimed that the respondent was wronged by the decree in the partition suit, if the decree of distribution is *res judicata*. The petition alleges that the guardian acted upon the advice of reputable counsel, and that he then believed that the property belonged to the community.

The judgment is reversed with directions to dismiss.

PARKER, MAIN, MOUNT, and MORRIS, JJ., concur.

[No. 12301. Department One. January 8, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE
KENNEY, *Appellant*.¹

INDIANS — MIXED BLOOD — INTOXICATING LIQUORS. Rem. & Bal. Code, § 6288, prohibiting the sale or gift to an Indian of mixed blood having more than one-eighth Indian blood applies to all such Indians, regardless of the status of their father or themselves as citizens, the prohibition of such act coming within the police power of the state.

CRIMINAL LAW—FORMER JEOPARDY—OFFENSE UNDER FEDERAL AND STATE LAWS. Where an offense is created under both Federal and state laws, an acquittal in the court of one jurisdiction does not bar a prosecution in the other for the same transaction.

CRIMINAL LAW—PUNISHMENT—EXCESSIVE SENTENCE. A sentence of two years in the state penitentiary for giving intoxicating liquor to an Indian of mixed blood, being within the limit fixed by law, will be presumed to be not an abuse of discretion, in the absence of any showing to the contrary.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered November 25, 1913, upon a trial and conviction of giving intoxicating liquor to an Indian. Affirmed.

H. N. Martin and E. A. Hesseltime, for appellant.

James S. Freece and C. A. Pettijohn, for respondent.

¹Reported in 145 Pac. 450.

CHADWICK, J.—Appellant was convicted in the court below upon a charge of giving liquor to an Indian of mixed blood and within the protection of ch. 140, Laws of 1909, p. 537 (Rem. & Bal. Code, § 6288; P. C. 135 § 1491).

It is first contended that the court erred in holding that the person to whom the liquor was given was an Indian. The father was a white man, a veteran of the Civil War. The mother was an Indian woman. The statute makes no exceptions in favor of citizen Indians or the offspring of those who are citizens. If there be the blood of an Indian to the degree of more than one-eighth in the person to whom liquor is given or sold, they are within the statute. *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912 B. 1088; *State v. Mamlock*, 58 Wash. 631, 109 Pac. 47, 137 Am. St. 1085.

The case of *United States v. Hadley*, 99 Fed. 437, is relied on. That case is seemingly in point, and we would be inclined to follow its reasoning if it could be applied under our statute. The defendant in that case was charged under a Federal statute providing for the punishment of "all Indians committing upon the person or property of another Indian or other person, any of the following crimes, namely, murder, &c." It was for the court to decide whether the person charged was an Indian. It was held that a half-breed child of a citizen parent was a citizen under the fourteenth amendment, and entitled to the rights and privileges and immunities of a citizen. Our statute says more than that liquor shall not be sold to an Indian; it bars the sale or gift to "a mixed blood Indian being more than one-eighth." Our statute, as was said in the cases cited, is referable to the police power under which the state may define a class to which intoxicating liquors shall not be given or sold. A citizen cannot claim a constitutional right to get drunk. Neither can he claim a constitutional right to give or sell intoxicating liquor to one of a class that is protected by the law because of its weakness and a disposition to be improvident when accustomed to use liquor even in moderate quantities. If it

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were so, laws prohibiting the sale of liquors to habitual drunkards, minors and others to whom its use may result in harm to society could not be sustained. The right of the state to enact the statute complained of does not rest upon any question of citizenship. The fourteenth amendment, which is relied on, is therefore in no way trenching upon or violated.

Counsel has made an able argument addressed to the policy of the law and in opposition to our former holdings, but we are inclined to our former position. It is for the legislature to work out the inequities of criminal statutes.

Defendant was acquitted upon a like charge in the Federal district court at Spokane. The judgment roll was offered in evidence by the defendant and rejected. There was no error in this. The rule is:

"As the same transaction may constitute a crime under the laws of the United States and also under the laws of a state, the accused may be punished for both crimes, and an acquittal or conviction in the court of either is no bar to an indictment in the other." 12 Cyc. 289.

See, also, *State v. Coss*, 12 Wash. 673, 42 Pac. 127.

Defendant was sentenced to serve a term of two years in the state penitentiary. This is complained of as excessive. We admit that it seems ample, but it is within the limit fixed by the legislature and we must presume, in the absence of any showing to the contrary, that the trial judge did not abuse his discretion.

Finding no error, the judgment is affirmed.

Crow, C. J., Gose, PARKER, and MORRIS, JJ., concur.

[No. 12300. Department One. January 8, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. J. F. AUSTIN,
Appellant.¹

JURY—COMPETENCY—PRIOR SERVICE AS JUROR. The fact that jurors had served at the same term of court in a criminal case of the same nature was not a disqualification, where all who were allowed to sit had asserted they would disregard the testimony given in the prior case and render a verdict upon the facts as disclosed in the case on trial.

WITNESSES—CROSS-EXAMINATION—CHARACTER WITNESS. In the cross-examination of character witnesses for the defendant in a criminal prosecution, it was not misconduct on the part of counsel to question such witnesses as to whether they did not know that defendant had been guilty of some misconduct and had lived with and associated with people of questionable character.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 14, 1914, upon a trial and conviction of disposing of intoxicating liquor to Indians. Affirmed.

E. A. Hesseltine and *H. N. Martin*, for appellant.

James S. Freece and *C. A. Pettijohn*, for respondent.

CHADWICK, J.—In addition to the questions raised and decided in the case of *State v. Kenney*, ante p. 441, 145 Pac. 450, it is complained that the court erred in permitting jurors to serve or to become subject to challenge by the defendant, it appearing that the jurors objected to had served as jurors in the *Kenney* case.

The court did not abuse its discretion. The jurors qualified themselves. So far as we have been able to discover, no juror was allowed to sit in the case who had not asserted that he would disregard the testimony given in the other case and render a verdict upon the facts as disclosed in the instant case.

¹Reported in 145 Pac. 451.

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It is also contended that the prosecuting attorney and counsel for the state were guilty of misconduct in that they persistently called the attention of the jury to the fact that the defendant was a brother-in-law of one Ed Gray, who had been convicted of horse stealing.

The only acts of counsel which, if torn from their settings, might be called misconduct, were in asking character witnesses, called to sustain those whose reputations had been put in issue, whether they did not know that defendant had been guilty of some misconduct and whether they, the witnesses, did not know that he lived with and associated with people of questionable character. This was within the limit of legitimate cross-examination.

We find no error, and the judgment is affirmed.

CROW, C. J., GOSE, PARKER, and MORRIS, JJ., concur.

[No. 12366. Department One. January 8, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Clear Lake Logging Railroad Company, Plaintiff*, v. THE SUPERIOR COURT FOR THURSTON COUNTY *et al.*, Respondents.¹

EMINENT DOMAIN—PUBLIC USE—LOGGING RAILROAD. A logging railroad is entitled to exercise the right of eminent domain to condemn lands for right of way on a showing of a large supply of timber tributary to the road, since the bringing of this timber to mill or market would constitute a public use regardless of the extent of the use.

SAME—PRIVATE INTEREST OF LUMBER COMPANY—EFFECT. The interest of the stockholders of a lumber company in a logging railroad is no objection to condemnation proceedings by the railroad company, since the latter is a public service corporation bound to give reasonable service to the public and is amenable to control by the public authorities.

SAME—SELECTION OF ROUTE—NECESSITY OF TAKING—REVIEW. The choice by a logging railroad of a route across respondent's lands as the most feasible and practicable will not be controlled by the

¹Reported in 145 Pac. 421.

courts because it may interfere with respondent's contemplated use of a portion of the land for a mill site, when there is no sufficient showing that the land sought is not reasonably necessary, and it was not convincingly shown that a slight change of location would meet the necessity of the taker and cause less damage to the owner; the availability for the owner's special purpose being an element to be considered in estimating damages, and not as defeating the right of condemnation.

EMINENT DOMAIN—COMPENSATION—PREPAYMENT—DAMAGES—APPEAL—COSTS. Under Const., art. 1, § 16, prohibiting the taking of private property without just compensation being first made or paid into court, the costs of an appeal, successfully prosecuted by the petitioner from an order denying a public use, which was reversed, cannot be taxed against the landowner; since the proceedings to review the order was a necessary part of the petitioner's proceedings to take the land, which the petitioner is required to pay before the taking.

Certiorari to review an order of the superior court for Thurston county, Claypool, J., entered August 26, 1914, denying the right to condemn property for a right of way for a toll logging road, tried to the court. Reversed.

Dysart & Ellsbury and *F. D. Oakley*, for relator.

T. F. Mentzer and *Troy & Sturdevant*, for respondents.

MORRIS, J.—This writ was sued out to review an order of the court below denying relator an order of public use and necessity. Relator, as indicated by its name, was organized as a toll logging road, and is seeking to condemn a thirty-foot right of way to extend its road a distance of about 3,500 feet across lands of the respondent Mentzer Brothers Lumber Company. The chief objections urged to the entry of the order of public use are, (1) no showing of any public use; (2) the contemplated use is the private use of the A. P. Perry Lumber Company; (3) other and more feasible locations not interfering with the respondent's contemplated use of its property. Relator offered evidence to the effect that there was from 150,000,000 to 250,000,000 feet of timber tributary to the first four miles of the proposed route, and

beyond that the supply was unlimited. Respondent's estimate of the amount of timber accessible was much less. It is evident, however, that there is a large supply of timber tributary to the proposed road. Bringing this timber to mill or market is certainly a public use. It is also shown that, since the relator began operating the road as at present constructed, it has been used to some extent for the shipment of timber products. The amount of service that has been rendered other parties is not so material in determining the question of the public use so long as the relator receives without discrimination all that is offered and has in no respect failed to discharge its duty in this regard. It is the nature and not the extent of the use that determines its public character. *State ex rel. United Tanners' Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

The second objection is based upon respondent's contention that relator is but another name for the A. P. Perry Lumber Company, and that its purpose is to serve the logging plant of the lumber company. The fact that a large part of relator's business would be the transportation of timber for the Perry Lumber Company, and that the timber company would exercise a controlling interest in the logging railroad, does not destroy the character of the relator as a public service corporation, nor change its contemplated use from a public to a private use. A like contention was urged against the right of condemnation in the *United Tanners' Timber Co.* case *supra*. It was there met by saying that public service corporations are amenable to public regulation and can be made to discharge their public duties in a satisfactory manner. Overruling a similar contention in *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637, we said:

"The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe to its capital stock does not deprive the road of its public character. The road when constructed will be a pub-

lic service corporation and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged."

In support of the third contention, respondent sought to show that the route selected by relator was not the most feasible or practicable route across the lands in question, that other available routes existed that could be made use of without serious damage to respondent, and that more especially the route selected would destroy a contemplated mill site. It may be said generally that in determining questions of this character it is not a question whether or not there is other land to be had that is equally available for the intended use, but the real question is whether the land sought to be taken is required for a public use; (*Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670), and whether upon all of the facts shown in the record the route adopted by the relator is the most feasible, and a reasonable necessity exists for its appropriation. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175. Except as specially restricted by statute, public service corporations invested with the power of eminent domain for a public use can make their own location according to their own views of what is best or expedient, and this discretion will not be controlled by the courts (*State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; 2 Lewis, Eminent Domain, § 604), until it is convincingly shown that the land sought is not reasonably necessary, and that a slight change of location will equally meet the necessity of the taker and be of much less damage to the owner. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855. The showing here made is not sufficient to invoke this last rule. Reviewing it as a question of fact, there is no question in our mind but that the route selected is both the most feasible and practicable.

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Nor can relator's right to this route be denied because it will cross a portion of respondent's land that respondent says is available for a mill site upon which, at some future time when conditions warrant, it intends to construct a mill. The availability for any special purpose of property taken or damaged in eminent domain proceedings is only one of the questions to be considered in estimating the damages to be paid. The courts cannot say to corporations exercising this right, you should select another route because it is cheaper or because you will destroy a valuable building site. The only thing we have to determine is the right to take the property, which, when it exists, applies equally to all property irrespective of its value or contemplated use.

The order under review is reversed, and the cause remanded with instructions to enter an order of public use and proceed with the condemnation proceedings.

CROW, C. J., GOSE, and PARKER, JJ., concur.

ON MOTION TO RETAX COSTS.

[Decided April 29, 1915.]

MOUNT, J.—The relator filed a cost bill amounting to \$152.10, which the clerk of this court refused to tax against the respondents. The relator has filed a motion to require the clerk to tax these costs against the respondents.

In the case of *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150, we held that article 1, § 16, of the constitution, providing that private property shall not be taken or damaged without just compensation having been first made or paid into court, prevents the taxation of costs in condemnation proceedings against the landowner in the lower court, but does not exempt him from the costs of his appeal to the supreme court. In that case, after reviewing several authorities, we said:

"It is manifest, from this long line of cases, that any form of procedure which taxes the costs of condemnation proceed-

ings in the superior courts to the landowner is in violation of the section of the constitution above quoted."

In *Grays Harbor Boom Co. v. Lowndale*, 54 Wash. 88, at page 98, 102 Pac. 1041, 104 Pac. 267, where the Grays Harbor Boom Company appealed from an award of damages in a condemnation proceeding, we reversed the judgment and awarded a new trial. The boom company filed a cost bill in this court which the clerk taxed against the petitioner, the respondent in the original case. We sustained a motion to strike the cost bill, for the reason that, under the constitution, no private property shall be taken or damaged for public use without just compensation having been first made or paid into court for the owner, together with costs of the proceedings to ascertain the damages. In that case we quoted from *Matter of New York etc. R. Co.*, 94 N. Y. 287, as follows:

"But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the landowners, to acquire their land against their will. In such a case to compel the landowners to pay any part of the expense incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation."

That rule must be followed in this case. It was incumbent upon the relator to prove that the use which it sought to make of the land was a public use. It was unsuccessful in the lower court. This necessitated a review of the order of that court. The proceeding leading up to the final adjudication of this court was a part of the proceeding necessary before the land could be condemned. The landowner had a right to stand by, or to resist the application, knowing that, before its land could be taken, the use for which it could be taken must be adjudged a public use, and the value thereof, with the costs of the proceeding, must be paid into court for its use and benefit. If the court had rendered a judgment

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holding that the contemplated use was a public use, and the landowner had sought to review that order, a different question would be presented. But in this case, the landowner did not seek the review. It was sought by the relator as a necessary part of the proceedings to take the land; and the petitioner was, therefore, required to pay the costs in this court, as well as the costs in the lower court, before the land could be taken. We are satisfied that the clerk properly refused to tax the costs against the landowner. The motion is therefore denied.

MORRIS, C. J., HOLCOMB, PARKER, and CHADWICK, JJ.,
concur.

[No. 11297. *En Banc*. January 9, 1915.]

WILLIAM BERG, *Respondent*, v. YAKIMA VALLEY CANAL
COMPANY, *Appellant*.¹

WATERS AND WATER COURSES—IRRIGATION—MUTUAL WATER COMPANIES—WATER AS APPURTENANT TO LAND—RIGHTS OF LESSEE. The owner of shares of stock in a mutual water company, each of which constitutes a water right for one acre of land, entitling him to a given quantity of water actually carried in the company canal for the irrigation of the lands described in the certificate, holds such water right as appurtenant to his land; and provisions in a lease of the land, showing an intent of the parties that the lessee should be entitled to one-half the water right of the lessor, would operate as an assignment of the water right and pass same to the lessee as an appurtenance to the land; thus placing the lessee in such privity to the contract between the owner of the land and the water company as would entitle him to a right of action against the water company for negligence in failing to properly maintain and keep in repair the irrigation ditch.

SAME—MUTUAL WATER COMPANIES—TRANSFER OF STOCK ON BOOKS—NECESSITY. The failure of a holder of stock in a mutual water company to have the same transferred to his name upon the books of the corporation, after sale and assignment to him, would not affect the right of a lessee of the land and water rights to maintain

¹Reported in 145 Pac. 619.

an action against the company for negligence, where the company had already recognized the rights of his lessor by furnishing him the amount of water represented by his stock, and had never refused to furnish the lessee on the ground that the stock had not been transferred on the books of the corporation.

SAME—FAILURE TO FURNISH WATER—NEGLIGENCE—LIABILITY. A mutual water company organized for the purpose of supplying water to its stockholders is required to exercise reasonable care in maintaining its ditch in proper repair and in furnishing each stockholder his proportionate share of water, and failure therein constitutes negligence for which it may be made to respond in damages at the suit of a stockholder or of a lessee in privity with him (CHADWICK, CROW, FULLERTON, and MOUNT, JJ., dissenting).

SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence in the maintenance and operation of an irrigation ditch is established where it appears that the company failed to clean out the ditch in the fall when it had a right to shut off the water for the purpose of cleaning out and making repairs; that no repair work was done during the winter, but was put off until spring, and then the water was shut off for repairs in disregard of the rights of patrons; that defendant did not supply the plaintiff with his proportionate share of the water that came down the ditch, but permitted stockholders occupying lands further up the ditch to take more than they were entitled to, and that by reason thereof plaintiff lost a large portion of his nursery stock.

DAMAGES—EXCESSIVENESS—LOSS OF GROWING CROP. A judgment for \$18,500, for damages as the result of the loss of nursery stock cannot be regarded as excessive, where the plaintiff's evidence of the value of the nursery stock in its condition at the time of its loss by reason of failure to receive water was uncontroverted; in view of the proper measure of damages for the loss of a growing crop being either its value at the time of the loss, or the market value at the time of maturity, less the cost of tilling, harvesting and marketing.

APPEAL AND ERROR—INADEQUATE DAMAGES—FINDING—SUFFICIENCY OF EVIDENCE. A finding by the court, who has viewed the land, as to the amount of damages incurred from loss of a growing crop through defendant's negligence, will not be disturbed as inadequate, although the evidence is sufficient to sustain a finding in a greater sum.

COSTS—ALLOWANCE ON CROSS-APPEALS. Where both parties appeal and neither prevails, costs will not be allowed in the appellate court.

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Opinion Per MAIN, J.

Cross-appeals from a judgment of the superior court for Yakima county, Grady, J., entered December 19, 1912, awarding damages to the plaintiff, in an action for breach of contract, tried to the court. Affirmed.

Englehart & Rigg (A. L. Agatin, of counsel), for appellant.

Tomas H. Wilson and Bogle, Graves, Merritt & Bogle, for respondent.

MAIN, J.—The purpose of this action was to recover damages alleged to be due to the negligence of the defendant in failing to properly maintain and keep in repair an irrigation ditch. The cause was tried to the court sitting without a jury. Judgment was entered for the plaintiff in the sum of \$18,500. The defendant appeals.

The facts are substantially as follows: The defendant, Yakima Valley Canal Company, is a corporation organized and existing under the laws of the state of Washington. The object for which this corporation was formed, as set out in its articles, was to construct, maintain, and operate a canal to carry water for irrigation and domestic purposes from the Naches river, in the county of Yakima, to the lands owned by its stockholders, situated in that county and in township 13, range 18 E., W. M. The water was to be furnished at cost to the owners of lands upon the line of the canal or lateral branches, who should share in the cost of construction, or become owners of the corporate stock. By the amended articles of incorporation, the capital stock of the corporation was \$4,200, divided into 4,200 shares of the par value of \$1 per share. No dividends were to be paid upon this stock. The canal, after it was constructed, was to be maintained and kept in repair by assessments each year made upon the stockholders. The certificates of stock which were issued provided that the owner of the shares therein specified, in accordance with the articles of incorporation and the by-

laws, was entitled for every share of stock to one forty-two hundredth part of the volume of water carried by the canal, so long as the water should be used upon the land described upon the back of the certificate.

On March 31, 1909, one William Steward became the owner, by purchase from E. B. Preble, of certain lands which were under the ditch. The certificates of stock which entitled Preble to water to be used upon this land were on this date assigned to Steward, but were not transferred upon the books of the corporation until February 21, 1911. On the 27th day of November, 1909, Steward leased, for a period of two years, one hundred acres of the land above mentioned to William Berg, the plaintiff. This lease provided that Berg would plant the land leased in apple trees of specified varieties, and would cultivate and care for the same during the period covered by the lease in a good and husbandlike manner. During the time covered by the lease, Berg had the right to plant the entire tract to nursery stock, provided he should not plant any nursery stock, or any other crops, nearer than three feet distant from the apple trees. The lease also provided that Berg should have the right to use a specified portion of the water from the Yakima Valley Canal Company, which was then owned by Steward and covered by the certificates which had been assigned and delivered to him by Preble. Berg was a nurseryman, and immediately entered into possession of the land for the purpose of engaging in the nursery business somewhat extensively. During the spring of the year 1910 he planted approximately seventy acres of land in nursery stock. For this purpose he employed about twenty-five men.

Berg claims that the defendant company was negligent in failing to properly maintain and take care of the irrigation ditch during the previous fall and winter, and for that reason he did not receive sufficient water during the spring of 1910 to grow the nursery stock which he had planted. By reason

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of the shortage of water, Berg claims damages in the sum of \$73,150.

At the conclusion of the trial, the court, at the request of one party and with the consent of the other, in company with a representative of each, examined the land. Other facts will be mentioned as they may become pertinent in connection with the consideration of the points urged for a reversal.

The questions to be determined are: First, the right of the plaintiff to maintain this action. Second, is the defendant company liable in damages for negligently failing to properly maintain and keep in repair the irrigation ditch? Third, does the evidence sustain the charge of negligence? And fourth, the amount of the damages.

I. In order to reach the real question in the case without unnecessary preliminary discussion, it will be admitted, for the purposes of this opinion, (a) that the Yakima Valley Canal Company is what is known as a mutual ditch company—that is, that the company was formed for the purpose of supplying water to its stockholders only, and not to the public generally; (b) that the action must be founded either in tort or contract; (c) that the present action is not one sounding in tort; (d) that an action based upon a contract must be brought by one who is either a party or stands in a relation of privity; and (e) that Berg was not a party to the contract. If, therefore, the present action can be maintained by Berg, it is upon the ground of privity. Whether that relation existed between Berg and the canal company depends upon whether, when Berg took his lease, a right to the water passed to him as an appurtenance to the land. It will hardly be denied that, if the water right passed as an appurtenance to the land, his right to maintain the action is well founded.

In a mutual company, the stock certificate represents the water right. A transfer or sale of the certificate may be made separate from the land for use on other land, and will

transfer the water right. But where it has not been thus sold or transferred, the question whether the water right is appurtenant to the stockholder's land is generally a question of fact, as is also whether on a sale or transfer of the land, the water right passes as an appurtenance. In 2 *Wiel, Water Rights in the Western States* (8d ed.), § 1269, speaking upon this question, the author states the rule as follows:

"So long as the company remains purely a mutual one, the certificate of stock represents the water right. A transfer or sale of the certificate is governed by much the same rules as those elsewhere considered regarding transfers of water rights. Whether the water right is appurtenant to the stockholder's land is a question of fact in each case, as is also whether on a sale of the land the water right passes as appurtenance. A sale of the certificate may be made separate from the land for use on other land and will transfer the water right, where the change does not injure other existing water users by the new place of use (who alone, however, can raise the objection that they are injured), the transfer being complete when (and not until) entered on the books of the company. On the other hand, in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water right and right to the certificate as an appurtenance."

In the present case, the water right, as evidenced by the certificate, was appurtenant to the land. The amended articles of incorporation specify that:

"Each share of stock of this corporation shall constitute a water right for one acre of land, and shall, when duly issued and delivered, vest in the lawful owner thereof, his heirs and assigns, title to one forty-two hundredth (1-4200) part of the water at any time actually carried by said canal . . ."

The by-laws of the corporation adopted by the stockholders specify the form of the certificate. The certificate provides that the owner of each certificate of stock shall be entitled to:

"One forty-two hundredth part of the volume of water carried by the canal of said corporation for each share of

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stock represented by this certificate, so long as he shall use said water upon the land described in the certificate upon the back hereof, and no longer, provided, however, that no water can be taken from said canal by virtue of the ownership of said stock until the certificate upon the back hereof has been filled out, signed and sealed by the secretary of this corporation."

The land formerly owned by Preble and transferred to Steward, was described upon the back of the certificates as issued to Preble and assigned and delivered to Steward at the time of the purchase of the land by him. Considering the respective provisions of the articles of incorporation, the by-laws and the stock certificate, it is plain that it was the intention to make the water right represented by the stock appurtenant to the land.

But it is contended that, even if the water is appurtenant to the land, it did not pass to Berg under the terms of the lease, in which it was provided:

"That he (Berg) will accept as the full water right for said land one-half of the water right now owned and held by said first party (Steward) to wit, one-half of one hundred shares of capital stock in the Yakima Valley Canal Company's main canal."

For what purpose was this provision placed in the lease? Steward desired the land leased planted in apple trees. Berg agreed to plant the trees, tend, irrigate and care for the same during the period covered by the lease. Berg had the right for his own purposes of planting the entire tract to nursery stock, except that he should not encroach upon the apple trees closer than three feet. The use of the water upon the land was absolutely essential to any practical attempt to carry out the provisions of the lease. Without the water, the purpose could not be accomplished. While the language used is not as specific as it could have been, it is yet quite sufficient to make the intention of the parties evident. The lease transferred to Berg the right to use the water as therein specified. The lease, for the period of time covered by it,

operated as an assignment of the water right as therein provided. In 3 Kinney, Irrigation and Water Rights (2d ed.), § 1484, it is said:

"So, again, where a tract of land is conveyed, 'with the water right appurtenant thereto,' or a similar expression used in the deed, and the shares of stock representing the water right were not assigned to the purchaser, such a conveyance must be deemed in law an assignment, and the purchaser can compel a transfer of the stock and delivery to him of all water which was actually appurtenant to the land at the time of the transfer."

The water, as appurtenant to the land, having passed to Berg by virtue of the lease, established his privity, and as a result his right to maintain the action. In *Booth v. Chapman*, 59 Cal. 149, the defendant had agreed to sell to the plaintiff 20 acres of land with the water right appurtenant. The water right had been purchased by Chapman from an incorporated irrigation ditch company. The plaintiff not receiving the amount of water which he claimed he was entitled to brought an action against his vendor. The court there held that the action could not be maintained, but should have been brought against the corporation which controlled the water. It was said:

"The contract was delivered to the plaintiff, and by virtue of it he took and still retains possession of the land, and as we construe the contract he became thereby invested with the water right appurtenant to the land. If so, he must look to the corporation which controls the water for the *pro rata* share belonging to said lot. It does not anywhere appear in the record that the defendant ever agreed to deliver any water to the plaintiff; and the court did not so find."

As sustaining the contention that Berg cannot maintain the action, the authorities cited by the defendant which most nearly approach the question will here be considered. They are: *Knowles v. Leggett*, 7 Colo. App. 265, 43 Pac. 154; *Barstow Irr. Co. v. Cleghon* (Tex. Civ. App.), 93 S. W. 1023; *First Nat. Bank of Longmont v. Hastings*, 7 Colo.

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App. 129, 42 Pac. 691; *Oligarchy Ditch Co. v. Farm Inv. Co.*, 40 Colo. 291, 88 Pac. 448; *George v. Robinson*, 23 Utah 79, 68 Pac. 819; 3 Farnham, Waters and Water Rights, p. 2001.

In both the *Knowles* and *Barstow* cases, the courts were considering leases where the owner of land had undertaken to furnish the tenant with a certain amount of water. In neither case was it attempted in the lease to transfer the water right to the lessee. There is an obvious distinction between a contract whereby the landlord undertakes to furnish water to his tenant and a contract whereby he attempts to transfer the right to the water itself to the tenant, as in the present case.

In the *First Nat. Bank* and *Oligarchy Ditch Co.* cases, there will be found language sustaining the defendant's contention. But in neither case was it necessary in deciding the cause then before the court to pass upon the question. In the *First Nat. Bank* case, there stood, in the name of one Dickson, stock upon the books of the ditch company. The bank brought suit and attached the stock. Prior to this time, the land on which the water represented by the stock was used had been sold and transferred by Dickson to a third person. Construing a statute then in force in the state of Colorado, it was held that an attaching creditor was not required to look beyond the books of the corporation to determine who owned the stock. In the *Oligarchy Ditch Co.* case, there were two corporations, one known as Oligarchy Ditch Company, which was the owner of a ditch with an appropriation of water attached thereto; the other was the Oligarchy Extension Ditch Company. The latter corporation owned no water right and was organized solely as a conduit company. The stock in the extension company did not represent independent water rights, but only the right to carry water obtained from the Oligarchy Ditch Company. It was held that a deed conveying the land, together with all the rights to use water for irrigating the premises, did not

include stock in the extension company. This company owning no water right, but being only a carrying company, it is plain that the right to have water carried which the stock represented would not pass as appurtenant to the land. There would seem to be a distinction between stock in a ditch company which represented the right to the water which had been appropriated and owned by the company, and stock in a corporation which owned no water rights, and only carried water for its members which they owned evidenced by certificates of stock in another corporation.

Farnham on Waters and Water Rights, *supra*, states the doctrine broadly that water represented by shares of stock cannot be said to be appurtenant to land. In support of this statement the case of *George v. Robinson*, *supra*, only is cited. An examination of that case will disclose that it does not support the declaration of the text writer. There the question arose between the vendor and the vendee of land. The vendee claimed the right to water as appurtenant under the covenant of warranty. Nowhere in the deed was there any express reference to water rights or water for irrigation or other purposes. It was held that the right to the water did not pass under the warranty. Had the right to the water been expressly mentioned or referred to in the deed, as it was in the Berg lease, the court there recognized that the rule would have been different when it said:

"From an examination of the evidence, the conclusion is irresistible that the water rights, in question, were treated by the owners as personal property, constituted no part of the realty, and not being expressly mentioned or referred to in the deed, were not conveyed with the land, and that there is no proof that warranted the court in finding that the water was appurtenant to the land, or that the water rights were included in the warranty."

But even if it were conceded that the authorities just reviewed do support the defendant's contention, we yet think the rule stated by Wiel, *supra*, is founded upon the better

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reason and in its practical operations would be more just and equitable. To cause arid lands to become valuable for agricultural purposes, water is absolutely essential. The doctrine which makes it a question of fact whether the water right is appurtenant to the land and whether it passes by a lease or other conveyance, seems to us sound.

Some claim is made that the corporation cannot be held liable because the stock still stood upon its books in the name of Preble. But this objection is not well founded. Prior to the time of the lease from Steward to Berg, the company had recognized the right of Steward in furnishing him water which was represented by the certificates. As to Berg, the officers and representatives of the corporation at no time refused to furnish him water because the stock had not been transferred upon the books of the corporation. There was no dispute between them and him as to the amount of water to which he was entitled. Had the officers of the company refused to furnish him water until the stock had been transferred upon the books of the company, a different question would be presented, upon which we now express no opinion.

II. It is argued that a corporation organized for the purpose of furnishing water to its stockholders is not liable even to the stockholders on the ground of negligence, and therefore it would not be liable at the suit of a tenant. It must be admitted that, if the corporation would not be liable to its stockholders, a tenant of a stockholder would stand in no more advantageous relation. Little space need be devoted to the discussion of this question. One of the purposes of the corporation set out in its articles was "To construct, maintain and operate a canal to carry water for irrigation and domestic purposes . . . to lands owned by its stockholders." By the by-laws, it was provided that one of the purposes for which the annual water rental was charged was to meet the maintenance and operation of the canal. The rule is that, where a corporation is organized for the purpose of supplying water to its stockholders, it is its duty to exer-

cise reasonable care in maintaining the ditch in proper repair and to see that each stockholder receives his proportionate share of the water. Failing in this duty the corporation is guilty of negligence, and may be compelled to respond in damages at the suit of a stockholder. *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245, 30 Pac. 882; *Rocky Ford Canal, Reservoir, Land, Loan & Trust Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638.

In the *O'Connor* case, speaking upon this question, it was said:

"The stated objects of the corporation, as expressed in the certificate and the stipulations in the deed, clearly define the duties imposed upon the corporation. By the terms and conditions thereof the corporation is bound to keep the main ditch supplied with water, and to regulate and divide its use among the several stockholders in accordance with their respective interests, and it must necessarily follow that for any neglect or failure to properly discharge its duty in this respect, it would be liable to the stockholder who is injured thereby to the extent of the damages suffered by him."

III. It is next claimed that the evidence does not show negligence. The trial court found that the defendant was chargeable with negligence in two respects, first, that it failed to properly care for its canal during the fall of 1909 and the following winter and spring; that this negligence consisted in omitting to clean the canal so that it would carry the quantity of water that it was intended to carry, and that by reason of this negligence the plaintiff did not receive the water as early in the spring as it was needed and as it was the duty of the defendant to furnish it; and second, that the defendant did not supply the plaintiff with his proportionate share of the water that came down the ditch, but permitted other stockholders occupying lands further up the ditch to take a greater portion of the water than they were entitled to; and that by reason of this negligence the plaintiff lost a portion of his nursery stock.

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The trial judge filed in the case a written opinion. Speaking on the question of negligence, he therein said:

"The testimony of the officers in charge of the company during the spring of 1910, shows a clear case of negligence of a very pronounced kind. Very little effort was made to clean out any part of the ditch during the fall of 1909 after the time when it had a right to shut off the water for the purpose of cleaning out and making repairs. No repair work seems to have been done during the winter. It was all put off until the spring and then the directors seem to have taken their time about everything. They turned the water on when it suited their pleasure and shut it off to make repairs which might have been made before, showing an utter disregard for the rights of the patrons of the company. No shortage of water is claimed, no serious breaks in the ditch, causing unavoidable delays, in fact, no substantial reason is shown why water should not have been delivered by the first of April, and delivered with reasonable continuity throughout the entire season sufficient to have prevented the loss sustained by the plaintiff."

The views of the trial judge as expressed in the findings of fact and in the written opinion are abundantly sustained by the evidence. It would unnecessarily prolong this opinion and serve no useful purpose to review the testimony upon this question.

IV. The defendant in its brief proclaims vigorously against the amount of the judgment. But this invective overlooks the evidence in the record. The plaintiff's evidence shows the value of the nursery stock in its condition at the time of its loss by reason of the failure to receive water. The defendant offered no directly controverting evidence. The proper measure of damages for the loss of a growing crop is the value of the crop at the time of the loss. This value may be arrived at either by evidence showing the reasonable value of the crop upon the land at the time, or the market value at the time of maturity, less the cost of tilling, harvesting and marketing. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254;

Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666, 37 L. R. A. (N. S.) 89.

The defendant offered evidence tending to show the inadaptability of the land for the purpose of producing nursery stock. The trial court, after the conclusion of the trial, as already stated, viewed the land. The plaintiff is prosecuting a cross-appeal claiming that the court erred in not making the award of damages sufficiently large. It is true that the evidence in the record would have sustained a larger verdict, had the cause been tried to a jury and such a verdict returned. This, however, would not be a reason for our disturbing the judgment of the trial court.

Both parties having appealed, and neither having prevailed, no costs will be allowed in this court.

The judgment will be affirmed.

ELLIS, GOSE, MORRIS, and PARKER, JJ., concur.

CHADWICK, J. (dissenting).—I dissent from the holding of the majority. Lack of time, owing to the change to be made in the personnel of this court within the next few days, prevents me from elaborating my views or going into the authorities. It will be enough to say that this action is brought against a mutual ditch company, not organized for profits, of which Steward was a member. Upon the theory of the majority, he is as guilty of negligence as any other member of the company and could not maintain an action in his own behalf. Berg stands in his shoes and can claim no greater right against the company than Steward could claim. Furthermore, a mutual ditch company should not be held to answer for the torts of one or more of its members. To do so, would charge the innocent as well as the guilty and put upon the innocent the burden of keeping a private contract made by one of the co-owners and in which they had no interest whatever.

In consultation I asked the majority to tell me, or to state in the opinion, how the judgment in this case could be ex-

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ecuted. The question was not answered nor has it been answered in the opinion. The answer to that question furnishes the key to the whole superstructure of this case. As it now stands, plaintiff has a judgment, which, in my opinion is a paper judgment which cannot be enforced by taking the property or money of the unoffending members. They owed Berg no contract duty, and no implied duty, and the water which they had bought and paid for is as essential to the tillage of their land as it was to the land leased by Steward to Berg. Surely no court will ever hold that the judgment can be executed by a sale of the ditch property. If it should, then may the property of the innocent and unoffending be taken at will, and justice will be a name without substance.

CROW, C. J., FULLERTON, and MOUNT, JJ., concur with CHADWICK, J.

[No. 11950. Department Two. January 9, 1915.]

LEO LAUER, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—FEDERAL EMPLOYEES' LIABILITY ACT—APPLICABILITY OF STATE STATUTE. The Federal employers' liability act, § 3, providing that contributory negligence is not a defense in any case where the common carrier's violation of "any statute" enacted for the safety of employees contributed to the injury, has reference only to Federal statutes; hence, in an action under that act, the failure of the employer to safeguard dangerous machinery under the state factory act, Rem. & Bal. Code, §§ 6587-6598, cannot be taken into consideration as excusing the employee's contributory negligence or his assumption of risks (overruling *Opahl v. Northern Pac. R. Co.*, 78 Wash. 197).

COURTS—RULE OF DECISION—FEDERAL QUESTIONS. State courts are required to follow the construction placed upon an act of Congress by the Federal courts.

MASTER AND SERVANT—ACTIONS—VARIANCE—RECOVERY AT COMMON LAW. In an action for personal injuries under the Federal em-

¹Reported in 145 Pac. 606.

ployers' liability act, in which plaintiff shows that the injury occurred in interstate commerce, he has no right to have the case submitted to the jury as a common law action, upon failure to prove a case under the Federal act.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 27, 1913, dismissing an action for personal injuries, under the Federal employers' liability act, upon granting a nonsuit. Affirmed.

Govnor Teats, Leo Teats, and Ralph Teats, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

Cushing & Cushing and Erwin E. Richter, amici curiae.

MAIN, J.—This action was brought under the Federal employers' liability act of April 22, 1908, as subsequently amended. The complaint charges, that, at the time of the injury, the plaintiff was engaged in interstate commerce. This was denied by the answer; but upon argument in this court was admitted. At the conclusion of the plaintiff's evidence, a challenge was interposed to the sufficiency of the evidence, and a motion made that the action be dismissed. From the judgment of the superior court dismissing the action, an appeal is prosecuted.

The plaintiff, at the time of the injury which he sustained, was working for the defendant in its car shops at South Tacoma, Washington. The accident happened about four or five weeks after he entered the employment. When he was first employed, he operated a single drill press for about ten days, and at times doing other work. After he had been at work operating the single drill press for the time mentioned, he began working on a gang drill. A gang drill is a machine capable of driving several individual drills at the same time. Above the drills is a revolving shaft, and the power from this is transmitted to the drills by means of cog wheels. At the time of the injury the plaintiff was operating one of the individual drill presses of the gang

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drill. This drill press, by means of a lever, could be started or stopped independent of the others. The plaintiff was injured about three or four weeks after he went to work upon the drill press connected with the gang drill.

On the morning of January 11, 1913, the plaintiff was boring holes by means of the drill through brake shafts which were to be placed upon cars engaged in interstate commerce. Without stopping his drill press, he took a small handful of waste, passed back of the machine, stepped upon a pile of iron, reached up and was wiping the oil off the framework of the machine. When his fingers were within two or three inches of the revolving cog wheels, the waste caught in the cogs and his hand by this means was injured by the cogs. The injury sustained was the loss of the end of the thumb, and the ends of the first and second fingers of the right hand.

The negligence complained of is the failure on the part of the defendant to have the cog wheels guarded. It is claimed that the failure to properly guard the cog wheels was a violation of the statute of this state generally known as the "factory act." Rem. & Bal. Code, §§ 6587 to 6598 (P. C. 291 §§ 61, 83), inclusive.

In the briefs, two questions are presented: First, when the action is brought under the Federal employers' liability act, can the failure of the defendant to conform to a state statute be taken into consideration in determining liability? And second, if the plaintiff cannot prevail under the Federal act, can he maintain the suit as a common law action?

I. Section 3 of the Federal employers' liability act, after setting out that contributory negligence shall not bar recovery, provides, that an employee shall not be held to have been guilty of contributory negligence in any case where the violation by the common carrier "of any statute enacted for the safety of employees contributed to the injury." Section 4 of the act provides that the "employee shall not be held to have assumed the risks of his employment in any

case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury." The question is whether the language "any statute enacted for the safety of employees" as used in each of the sections mentioned, includes state statutes, or is limited to the acts of Congress. The plaintiff claims that the defendant violated the factory act of this state in failing to have the cog wheels guarded. If state statutes are included within the term "any statute" as used in §§ 3 and 4 of the Federal act, then the question would arise whether, under the factory act, the cog wheels should have been guarded. If the term "any statute" does not include a state statute, then the question does not arise whether under the factory act of the state the cog wheels should have been guarded. The phrase "any statute enacted for the safety of employees" was held in *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, to mean Federal statutes and not state statutes. In the course of the opinion in that case, speaking upon the exact question, it was said:

"By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal statutes, such as the Safety Appliance Acts (March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; April 4, 1910, c. 160, 36 Stat. 298; February 17, 1911, c. 103, 36 Stat. 913); and the Hours of Service Act (February 4, 1907, c. 2939, 34 Stat. 1415). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

It must be admitted that the decision in that case is out of harmony with the view expressed by this court in *Opsahl v. Northern Pac. R. Co.*, 78 Wash. 197, 138 Pac. 681. The

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question calls for the construction of an act of Congress; and the Federal supreme court having construed the statute, we think this court should follow the construction placed upon it by that court. The decision in the *Opsahl* case was rendered some months prior to the decision in the *Seaboard Air Line R. Co.* case. So far as these decisions are out of harmony, the *Opsahl* case will be overruled.

II. It is claimed, however, that if this court should be of the opinion that the factory act does not apply, then the case should have been submitted to the jury as a common law action. The injury in this case occurred in interstate commerce. The action, as already indicated, was brought under the Federal act. Can plaintiff then, when his action fails under the Federal act, pursue the action at common law. In *Wabash R. Co. v. Hayes*, 234 U. S. 86, speaking upon this question, it was said:

“Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [Citing authorities].”

Had it appeared upon the trial that the plaintiff, at the time of the injury, was not engaged in interstate commerce, and the complaint had stated an action at common law, a different question would be presented. *Baird v. Northern Pac. R. Co.*, 78 Wash. 67, 138 Pac. 325.

The judgment will be affirmed.

CROW, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12177. Department Two. January 9, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v.
STEWART STEELE, *Appellant*.¹

INDICTMENT AND INFORMATION—SUFFICIENCY—INCLUDED OFFENSES—ASSAULT—DEGREES. Under Rem. & Bal. Code, § 2415, providing that every person committing an assault without amounting to an assault in either the first or second degrees shall be guilty of assault in the third degree, an information charging assault with intent to commit a felony, to wit, a rape, which is a charge of second-degree assault, is sufficient to sustain a conviction for the lesser offense of third degree assault, without specifically defining the crime of assault in the third degree.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 23, 1914, upon a trial and conviction of assault. Affirmed.

John Stringer and *George F. Hannan*, for appellant.

John F. Murphy and *Robert H. Evans*, for respondent.

MAIN, J.—The defendant in this case was charged by the information with the crime of assault in the second degree. By the verdict of the jury he was found guilty of assault in the third degree. From the judgment entered upon this verdict, the appeal is prosecuted.

The information, after reciting that the defendant was accused of the crime of assault in the second degree, continued as follows:

“He, said Stewart Steele, in the county of King, state of Washington, on the 19th day of February, 1914, did then and there wilfully, unlawfully and feloniously make an assault upon the person of one Camila Casaleri, a female person, with intent then and there to commit a felony, to wit, rape upon said Camila Casaleri, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.”

¹Reported in 145 Pac. 581.

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The only question here for determination is whether the information charges a crime.

Section 2413, Rem. & Bal. Code (P. C. 135 § 321), provides what shall constitute an assault in the first degree. Section 2414 (P. C. 135 § 323) defines the crime of assault in the second degree. Section 2415 (P. C. 135 § 325) provides that every person who shall commit an assault without amounting to an assault in either the first or the second degrees, shall be guilty of an assault in the third degree. The information is laid under subdivision 6 of § 2414, which provides that:

“Every person who, under circumstances not amounting to assault in the first degree . . . shall assault another with intent to commit a felony . . . shall be guilty of assault in the second degree . . .”

The section concludes by fixing the penalty. Under § 2435, Rem. & Bal. Code (P. C. 135 § 365), the crime of rape is a felony. That the information was sufficient to charge an assault in the second degree is a question hardly open to debate. While this is not formally admitted, it does not seem to be seriously controverted.

But it is contended that, since the appellant was convicted of assault in the third degree, and the information does not charge that degree of crime, it is insufficient. In this we cannot concur. The information being sufficient to charge an assault in the second degree would sustain a conviction for the lesser crime of assault in the third degree.

It is argued, however, that, under the doctrine announced in *State v. Heath*, 57 Wash. 246, 106 Pac. 756, the information is insufficient. In that case the defendant was charged with the crime of assault with a deadly weapon with intent to inflict bodily injury. Upon motion of the prosecuting attorney, the charge was reduced to that of an assault. No change, however, was made in the complaint. Neither was a subsequent complaint or information filed. The defendant was convicted in the justice court by a jury, and ap-

pealed to the superior court, where he was again convicted. That case is distinguishable from the present in this: There, the gravamen of the offense for which the defendant was tried in both courts was that of an assault. Here the gravamen of the offense was the "intent to commit a felony," to wit, the crime of rape. As already stated, the information being sufficient to charge the crime of assault in the second degree, it would sustain a conviction for the lesser crime of assault in the third degree. To hold it was necessary to define the crime of assault in the third degree in the information charging an assault with intent to commit a felony, in order to sustain a conviction of simple assault, would be to extend the doctrine of the *Heath* case. This we think should not be done.

The judgment will be affirmed.

Crow, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 12069. Department One. January 11, 1915.]

M. P. ZINDORF *et al.*, Appellants, v. J. B. TILLOTSON *et al.*,
Respondents.¹

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS—WAIVER OF OBJECTIONS. Under Rem. & Bal. Code, § 307, requiring the supreme court to disregard all errors on appeal which do not affect the substantial rights of the complaining party, the failure of the defendant to designate his affirmative defense as a cross-complaint or counterclaim should be deemed harmless error, where his prayer was for the aggregate of the compensation and damages claimed, and the case was tried upon the merits after the plaintiffs had joined issue upon such affirmative matter.

CONTRACTS—MODIFICATION—PROMISE OF EXTRA COMPENSATION—CONSIDERATION. Although a subcontractor has contracted to do the grubbing as a part of the excavation in highway construction, the contractor's subsequent promise to pay additional compensation for excess grubbing is based upon a valid consideration, when the contract had been made with the understanding that the grubbing

¹Reported in 145 Pac. 587.

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would not exceed a certain amount and on discovery of the discrepancy the contractor requested his subcontractor to complete the grubbing and agreed to pay the reasonable value thereof.

FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. In an action by a subcontractor against the principal contractor to recover the value of excess work on a road contract, fraud on the part of the latter is sufficiently shown, where it appears that the latter was an experienced road builder, knew the nature of the clearing and grubbing to be done, and the prices for which it could be profitably done; that he knew the necessary amount of grubbing would equal at least twenty acres, but represented to the subcontractor that he had personally examined the road and there was about nine or nine and one-half acres of grubbing; that the subcontractor was less capable and experienced, and without sufficient time to carefully examine the nature and extent of the work before entering into the contract, and relied upon the representations of the principal contractor; and that there were in fact twenty-five acres of grubbing in excess of the representations of the latter.

CONTRACTS—EXTRA WORK—REASONABLE PRICE—EVIDENCE—SUFFICIENCY. In an action by a subcontractor to recover the reasonable cost of grubbing in road construction work, on the principal contractor's promise to pay therefor, in which the evidence varied from \$65 to \$263.97 per acre, the contract price of the principal contractor, who knew the prices at which such work could be profitably done, to do the work at \$110 per acre, is a fair basis upon which to establish the reasonable value of the work.

Appeal from a judgment of the superior court for Pacific county, Back, J., entered January 23, 1914, upon findings in favor of the defendants, in an action on contract, tried to the court. Modified.

O'Phelan & Murray and *McClure & McClure*, for appellants.

Welsh, Welsh & Richardson and *Stapleton & Sleight*, for respondents.

Gose, J.—This controversy arose between the plaintiffs, as contractors, Pacific county, certain lien claimants, and the defendant J. B. Tillotson, a subcontractor. The plaintiffs were dissatisfied with the judgment, and have appealed.

The following are the facts: On July 3, 1911, the appel-

lants entered into a contract with Pacific county, whereby they agreed to construct a section of state road No. 5. On July 18, they made a subcontract with the respondent, wherein he agreed to supply the labor, material, and equipment for the construction of the road, excepting piling, cedar posts, sills, culverts, curbing, planking, and bridges. The respondent did not pay all his bills for labor and material, and claims were filed with the board of county commissioners against the contract and bond. The commissioners thereupon refused to make the final payment to the appellants and they commenced this action against the respondent, the surety on his bond, Pacific county, and all persons who had filed claims against the work.

After putting in issue certain matters alleged in the complaint, the respondent, for a further and separate answer and defense, alleged, among other things, that he contracted to do the excavating, including grubbing, at an agreed price of twenty-three and three-fourths cents per cubic yard, believing and relying upon the express representation of the appellants that the grubbing would not exceed ten acres; that it comprised thirty-five acres, a fact known to the appellants prior to and at the time of the execution of the subcontract; that the respondent had no personal knowledge of the amount of grubbing; that the appellants' representation as to the number of acres to be grubbed was made for the purpose of deceiving the respondent and inducing him to enter into the contract; that as soon as the respondent learned that there was more than ten acres of grubbing, he notified the appellants and demanded that they arrange for doing the excess grubbing; that the appellants thereupon requested the respondent to complete the grubbing, and agreed to pay him the reasonable value thereof; that he completed the grubbing and that the excess, amounting to twenty-five acres, was reasonably worth \$8,000. The appellants joined issue upon these allegations. They made no objections to

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the pleadings in the lower court, by motion, demurrer, or otherwise.

They now contend that the affirmative defense cannot be treated as a counterclaim or cross-complaint, and have cited authorities from other jurisdictions to sustain their view. The case was tried upon the merits after the appellants had joined issue upon the affirmative matter pleaded, and the objection comes too late to merit serious consideration. Our statute, Rem. & Bal. Code, § 307 (P. C. 81 § 308), requires us to disregard all errors which do not affect the substantial rights of the complaining party. *Maxwell v. Dimond*, ante p. 80, 145 Pac. 77.

The failure of the respondent to designate the affirmative defense as a counterclaim or cross-complaint, and to pray for separate relief, in no way imperiled the substantial rights of the appellants. The two affirmative defenses were pleaded, and the prayer was for the aggregate of the compensation and damages claimed.

It is argued that the respondent had contracted to do the grubbing as a part of the excavation, and that the appellants' promise to pay for the excess grubbing was without consideration. This question is no longer a debatable one in this state. We held to the contrary in *Evans v. Oregon & Wash. R. Co.*, 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455. A like view was announced in *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625; *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 498; *Lins v. Schuck*, 106 Md. 220, 67 Atl. 286, 124 Am. St. 481, 11 L. R. A. (N. S.) 789; *Domenico v. Alaska Packers Ass'n*, 112 Fed. 554.

We will consider the questions of fraudulent representations and the appellants' promise to pay for the excess grubbing together. The appellants' contract with the county was upon a unit basis. The county agreed to pay them, for clearing, \$125 per acre; for grubbing, \$110 per acre; for easy excavation, thirty-one cents per cubic yard; for rock work, \$1.20 per cubic yard. The appellants agreed to pay

the respondent as follows: For clearing, \$65 per acre; for excavation, which included grubbing except solid rock, twenty-three and three-fourths cents per cubic yard; solid rock, eighty-five cents per cubic yard. The court found that the appellant Zindorf is a capable, experienced road builder; that he knew the nature of the clearing and grubbing to be done in the construction of the road; that he knew the prices for which such work could be profitably done by experienced contractors; that the respondent had but slight experience in such work "and was much less capable and experienced" therein than the appellants; that Zindorf represented to respondent that he had personally examined the road and that there would be about nine or nine and one-half acres of grubbing; that he requested the respondent to make his bid so that the work of excavation would include grubbing; that Zindorf then knew that there was more than twice the amount of grubbing he had represented; that he misrepresented the amount of grubbing purposely and with the intention of deceiving the respondent and of inducing him to enter into the subcontract; that the respondent relied upon his representations and contracted upon the belief that they were true; that respondent made a casual examination of the route of the road from the platform of a railroad train which ran parallel with the road, but that he did not examine the work with a view to estimating the quantity of grubbing.

The court further found that, after respondent had completed grubbing nine and one-half acres and had found that there was much more grubbing to be done, he notified the appellants that he had completed the grubbing which he had agreed to do, and told them that if he did any more grubbing it would be done at the cost of the work plus ten per cent; that otherwise he would do no more grubbing, and that it was then mutually agreed between them that the respondent should complete the grubbing and the appellants would pay him for all grubbing in excess of nine and one-half acres, and that the excess was twenty and four-fifths acres.

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A discussion of the evidence upon which these findings were based would be profitless. We have read both abstracts of the testimony. The appellant Zindorf knew before the subcontract was made that the county engineer of Pacific county had estimated the grubbing at twenty acres. Despite this knowledge, he wrote the respondent, before the subcontract was made, that it was between nine and ten acres. Zindorf knew that the respondent's time for making his bid was so limited that he could not go over the work and estimate the quantity of grubbing to be done with any degree of accuracy. The parol testimony is in direct conflict, but viewed in the light of all the attending circumstances, we cannot say that the court did not correctly interpret the evidence.

The court found that the subcontract provides that the respondent shall be paid for all extra work on forced account the actual cost of the work plus five per cent; that the actual cost of the grubbing was \$263.97 per acre, which with five per cent added makes \$277.17 per acre, which is "a reasonable sum" for the appellants to pay for the excess grubbing.

Upon this subject the appellant Zindorf testified that the reasonable cost of the grubbing was fifty dollars an acre. The county engineer of Pacific county said that the reasonable value of the grubbing "for the average" was \$75 per acre. Another witness, whose qualifications were admitted and who knew the character of the timber, testified that the reasonable cost of the grubbing would average about \$65 per acre. Another witness, whose qualifications were admitted, and who was also familiar with the road and who said that he took particular notice of the soil and the timber, placed the reasonable cost of the grubbing at \$75 to \$80 per acre. The respondent and one or two witnesses fixed the value of the grubbing in harmony with the finding of the court. It may have cost the respondent that price per acre. It will be remembered that the court found that the appellant Zindorf is a capable, experienced road builder; that the re-

spondent had had limited experience in road work through timber; that Zindorf knew the nature of the clearing and grubbing to be done in the construction of the road, and that he knew the prices at which such work could be profitably done. He had contracted to do the grubbing at \$110 per acre. The respondent testified that, at the termination of a heated controversy over the excess grubbing, Zindorf said to him, "There is no use rowing about this thing. You go ahead and do the grubbing and we will adjust it." This language we have construed as creating a new contract. In effect Zindorf said to the respondent, We will pay you a reasonable price per acre for the excess grubbing. It will be remembered that the respondent under the subcontract received \$65 per acre for clearing. In the light of all the evidence and the finding of the court, which we have adopted, as to the knowledge and experience of Zindorf of the nature and character of such work and the reasonable price at which it could have been performed, we think \$110 per acre is a reasonable price for the excess of twenty and four-fifths acres.

The cause is remanded with directions to modify the judgment accordingly.

CROW, C. J., CHADWICK, MORRIS, and PARKER, JJ., concur.

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[No. 11211. Department One. January 11, 1915.]

JOHN DIBERT *et al.*, *Appellants*, v. MORITZ PETERSEN,
Respondent.¹

CANCELLATION OF INSTRUMENTS—FRAUD—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. Parties conveying away their realty for an inadequate consideration, in reliance upon the representations of a fellow countryman that there was danger of losing it, their object being to divest themselves temporarily with a view to protecting themselves against creditors, are entitled to a cancellation of the deed on refunding to the grantee his outlay occasioned in consequence of the transaction, with all accrued interest.

APPEAL—SUPERSEDEAS BOND—FORM. A supersedeas bond on appeal conditioned to pay the judgment, fairly indicating that it is given on behalf of all the appellants, is sufficient, on objection first made in the supreme court, although the wife of one of the principals did not join in the bond.

Appeal from a judgment of the superior court for Spokane county, Baske, J., entered April 23, 1912, dismissing an action for equitable relief, after a trial to the court. Reversed.

Perkins & Honefenger, for appellants.

Geo. W. Belt, for respondent.

CHADWICK, J.—Plaintiffs brought this action against defendant for the purpose of securing the reassignment of a judgment which they had obtained against Ernest Dibert and wife, which had been assigned to defendant; to cancel a deed made by them to defendant, dated April 13, 1911, and for the sum of \$370, money received by defendant from the sale of horses belonging to plaintiffs and retained by defendant. A *lis pendens* was filed against the real property involved, which is described as that part of the southwest quarter of section 2, township 21, north of range 43, east Willamette Meridian, Spokane county, Washington, lying

¹Reported in 145 Pac. 589.

and being west of what is known as the Pine Creek Road; also the south half of the southeast quarter of section 2, aforesaid; also the southeast quarter of the southwest quarter of section 2, aforesaid; also that part of the northeast quarter of section 11, township 21, north of range 43, east of the Willamette Meridian, lying and being north of what is known as the Plaza Road, in Spokane county, Washington.

All parties to the action are Germans, and while defendant lays some claim to an understanding of the English language and of business as transacted in this country, plaintiffs are almost entirely lacking in this respect. We feel justified in saying that they are extremely ignorant, and we cannot but doubt that they ever understood any material part of the facts and proceedings in this action. The judge of the court below, who understood German, was impelled to repeat in German questions asked by counsel, and in turn attempted to interpret their answers. It has been difficult for us to arrive at a definite conclusion.

Plaintiffs contend that defendant, through misrepresentations, fraud and deceit, induced them to assign the judgment which they held against Ernest Dibert to him, promising to reassign it and deed their property back if a new trial was not granted in a case waged by them against Ernest Dibert. Plaintiffs allege that both the assignment of the judgment and the conveyance of the property were without any consideration whatever and were made solely for the purpose of securing protection, as they supposed, from their creditors; that for the same reason they gave defendant a bill of sale of their horses, eight in number, and that defendant afterwards sold the horses for the sum of \$370. They allege that defendant still retains possession of this money. All of the material allegations are denied by defendant, who asserts that plaintiffs requested him to take a bill of sale of the horses to keep Ernest Dibert from taking them away from them; that plaintiffs consented to the sale of the horses, and that they also gave their consent to the payment of \$150 of the pur-

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chase money to Belt & Powell, attorneys in their suit against Ernest Dibert; that plaintiffs proposed to sell him the land in question for \$1,000, subject to a mortgage thereon of \$1,625 (one-half of which sum defendant had already assumed when he purchased an adjoining piece of land from Ernest Dibert which was also covered by mortgage); that on the 13th day of April, 1911, defendant accepted said offer, and plaintiffs thereupon conveyed said land to defendant, subject to said mortgage; that defendant gave plaintiffs two notes, one for \$400, payable November 1, 1911, and the other for \$600, payable November 1, 1912; that the \$400 note was transferred to Belt & Powell in payment of attorneys' fees in the suit against Ernest Dibert; that plaintiffs were indebted to defendant for money loaned and other advancements in the sum of \$307.50; that this sum was indorsed as paid on the \$600 note; that at the time plaintiffs conveyed said land to defendant, they assigned to him the judgment of \$1,625 which they held against Ernest Dibert, they believing he would be able to collect it for them; that defendant, at the request of plaintiffs, made a bill of sale to the purchaser of the horses and offered the purchase money to plaintiffs, but that they requested him to pay \$150 of said \$370 to Belt & Powell, which he did, and that they requested him to hold the balance, \$220, subject to their demand; that they have never called for it; that he paid interest amounting to \$54 on the mortgage of \$1,625 which was placed on the property when it was originally purchased, and taxes in the sum of \$51, after he purchased the property from plaintiffs. Defendant also claims that plaintiffs are not prosecuting the action in good faith.

At the time of the trial, defendant tendered \$220, the balance of the purchase money remaining from the sale of the horses, and also tendered the judgment. Both of these tenders were accepted. The lower court found that plaintiffs

had failed to sustain the allegations of their complaint, and dismissed the action without cost to either party.

Respondent makes claim to an unselfish interest in plaintiffs' affairs, but it must be remembered that he already owned adjoining land, and in one instance, if not more, stated that he needed the Dibert land so as to make his holding complete, "altogether." Different witnesses testified that the land was worth from \$5,000 to \$6,000.

The lower court defined the issue of the case to be: (1) Did fraud and deceit enter into the transfer of the property? (2) Were fraudulent representations made to the plaintiffs with reference to the return or reconveyance of the property? (3) Was there any consideration?

Respondent claims that, as a part of the consideration for the sale of the land by appellants to him, they were to have the crop for the year 1911, he to have the pasture; and in support of this contention, sets up certain conversations and admissions of plaintiff John Dibert during the trial:

"Q. Now you had a crop in there at that time, didn't you? A. Yes. Q. Well, he gave you permission to take that off, didn't he? He said you could take it off? A. Well, he said, no, take that off, but he said, 'I will leave you that; I no want that.' Q. Oh, he said he would leave you that? Mr. Perkins: On whose land was this? Mr. Belt: On this land. Q. The crop was on this land, wasn't it? A. Yes. Q. Yes, and he said he would leave you that? A. Yes. Q. You could take it off? A. Yes."

Looking to the whole case, we are not disposed to hold this testimony to be destructive of appellants' case. They admit they knew that Petersen held the deed to the land, but they insist that he held it for the purpose of protecting their interests and would deed it back at any time they desired. If their belief was sustained by their understanding of their relation to respondent, they were entitled to the crop in any event.

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Counsel for defendant further says:

"The complaint alleges, and John and Herman Dibert both testify, that respondent got them to give him the deed and the bill of sale by telling them that Ernest would take the land and horses away from them if he got a new trial, yet Herman says: Q. Didn't I (counsel) tell you that Ernest, after the trial of the case and after Ernest had made a motion for a new trial, if he were to get a new trial, he couldn't possibly get the horses back, and he couldn't possibly get the land back, because he had never claimed them? A. Yes."

But counsel is perhaps unconsciously assuming the ability of the witness to reason and to comprehend the transaction.

Nor should appellants be held to have lost their right to assert an interest in the land, if any they have, because they were told by counsel for respondent, at a time when respondent offered to deed the land back, that "this was their opportunity," and because they did not do so their conduct should stand as a bar to their present assertion of title to the land; but when it is understood that the plaintiffs could hardly make themselves understood in the English language, and that whatever counsel said to them must have been talked over in German with the respondent, we are not satisfied that they had any understanding other than that the respondent was holding the land for them. Then, too, the consideration seems inadequate. If a new trial had been granted in the case of appellants v. Ernest Dibert, he could not have taken the land because he did not claim it. There was no excuse, certainly none is shown, for the transfer of the judgment or for the bill of sale of the horses. We cannot believe, with the whole record before us, that appellants would have so acted if they had not been led, without understanding, into the transaction by the respondent. At the time the transfer was made, they had won a lawsuit against Ernest Dibert; a motion for a new trial was pending; respondent was their faithful and steadfast friend; he owned land adjoining; it was to

his interest to put fear into the hearts and minds of these plaintiffs so that he might involve the title in a way that he could eventually claim the land.

We confess our inability to say that we are positive that these things are so, but the probability is so overwhelming we think that if there ever was a case where the parties should be relegated to their original positions and made to deal with each other under the broad principles of equity, this is the case. Respondent offered at one time to deed the land back to plaintiffs. If he is given his money and his interest he should not now complain.

Neither are we impressed by the argument made by counsel for respondent that the testimony of the plaintiffs is contradictory. As we have said, plaintiffs, especially the witness John Dibert, had little comprehension of what was going on in the court room, owing to his lack of understanding of the English language. He does not even write his name, and is possibly of a lower order of mentality than the average man.

We believe that equity will be done in this case if respondent is given that which he put into the transaction. We have, therefore, decided to remand this case with instructions to the lower court to take an account of the affairs of the parties to this action, and to order a reconveyance of the land upon the payment to the respondent of his money with interest, and all sums paid in the way of taxes and for betterments, and the sums paid to Belt & Powell as attorneys' fees.

We have not overlooked respondent's motion to dismiss the appeal in this case. A notice of appeal was given by all of the parties plaintiff. The bond was not signed by Anna Dibert, the wife of Herman Dibert, although it was signed by John Dibert, Caroline Dibert and Herman Dibert. It is in form a supersedeas. No objection was made to the form of the bond in the court below.

The motion is denied under the authority of *Thomas v. Lee*, 74 Wash. 286, 133 Pac. 446, 134 Pac. 510. The juris-

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diction of this court depends upon the notice of appeal and not upon the form of the bond.

Each party will pay their own costs on appeal.

CROW, C. J., ELLIS, and GOSE, JJ., concur.

[No. 12153. Department One. January 11, 1915.]

H. M. CLARKE, *Respondent*, v. YUKON INVESTMENT COMPANY,
Appellant and Respondent, PURCELL INVESTMENT
COMPANY *et al.*, *Respondents and Appellants*.¹

LANDLORD AND TENANT—REPAIRS — LIABILITY OF LANDLORD — FIRE ESCAPES—POLICE REGULATIONS. Rem. & Bal. Code, § 6030 *et seq.*, relating to hotels, inns, and public lodging houses, regulating the construction of fire escapes therefor, and providing (§ 6046) that "any owner, manager, agent or person in charge of a hotel" who shall violate the provisions of the act shall be guilty of a misdemeanor, has reference to the owner of a hotel business (under lease without restrictions upon the use or covenants to repair) and not the owner of the building (out of possession); and hence, where fire escapes are required upon a hotel building under the exercise of the police power, the duty and expense of construction devolves upon such a lessee where there is no covenant in the lease imposing such duty on the landlord.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 9, 1914, in favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Reversed as to one defendant.

Bausman, Kelleher, Oldham & Goodale, for appellant Yukon Investment Company.

Walter B. Beals, for respondent Clarke.

Hughes, McMicken, Dovell & Ramsey and *Gay & Kelleran*, for respondent Purcell Investment Company.

CHADWICK, J.—The Yukon Investment Company is the owner of a certain brick building in the city of Seattle known

¹Reported in 145 Pac. 624.

as the Tourist Hotel property. The Purcell Investment Company held the premises under a long term lease. The lease contained the following provisions:

"Lessee agrees to keep said premises in good repair, and to make all necessary repairs of whatever nature to said premises. . . . That it is the understanding and intent of the parties hereto that said lessor shall not be required to expend any money on said premises during the term of this lease except for taxes, general and special. . . . That lessee . . . shall not suffer or permit therein any violation of any of the laws of the state of Washington, or of any of the ordinances of the city of Seattle. . . . It is provided that all such alterations are to be paid for by the tenant."

After the lease had run for about two years, the city of Seattle, through its proper agents, notified the Yukon Investment Company that it would be necessary to install an additional fire escape. The company replied that the property was held under a long term lease and disclaimed liability. Whereupon the city notified the Purcell Investment Company. The agent of the Purcell Company had certain negotiations with the Yukon Company out of which, as it is alleged in the pleadings, a contract to pay for the fire escape arose, and that it thereafter acted only as the agent of the Yukon Company. In any event Purcell negotiated with plaintiff for the installation of a fire escape, accepting the proposal to do so in writing as follows:

"The H. M. Clarke Iron & Wire Works, June 28, 1913.

"1926-29 Western Avenue, Seattle, Washington.

"Gentlemen: Confirming our telephone conversation of this date, we accept your proposal of the 24th inst., to build and install the fire escape and balconies on the Tourist Hotel Bldg., cor. Occidental Ave. and Main Street, for the sum of nine-hundred forty-eight and no-100 dollars (\$948), same to be in accordance with drawings furnished and in compliance with city ordinances. Yours very truly, Purcell Investment Company, by P. F. Purcell."

We agree with the trial judge that there was hardly a pretense of sustaining this theory of the case upon the trial.

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Certainly the Purcell Company did not maintain the burden of proof, and we shall not review the testimony but proceed at once to discuss the legal phases of the case.

In the absence of a covenant to make repairs or to keep the property in proper condition for the uses intended, there is no liability on the part of the lessor to do so. It has been so held by us in *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 Pac. 927; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917; *Johnston v. Nichols*, *ante* p. 394, 145 Pac. 417. The Yukon Company insists that it is not liable (a) under the express terms of the lease, and (b) by a fair construction of the whole act, ch. 29, Laws of 1909, p. 43 (Rem. & Bal. Code, § 6030 *et seq.*), it is evident that the legislature intended it to apply only to an owner who is in possession and who is conducting a hotel business, and the conclusion is compelled that all of the burdens of the act should be borne by the business. Counsel cite: *McManamon v. Tobiason*, 75 Wash. 46, 134 Pac. 524; *Rockwell v. Eiler's Music House*, 67 Wash. 478, 122 Pac. 12, 39 L. R. A. (N. S.) 894; *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N. S.) 432.

This court has held that, where premises are let under general terms, no restrictions being put upon the use, the lessee having the privilege to use them for all lawful purposes, the landlord is not bound to meet a burden imposed by a statute or an ordinance, whether that burden be in the form of money expended to meet the demands of the sovereignty or whether the use to which the property is put is impaired or destroyed in virtue of the statute or ordinance. The theory being that one who leases property without restriction as to use takes under an implied obligation to meet every expense incident to the use to which it may be put, whether induced by considerations of convenience or profit, or whether compelled by superior authority. If it were not so, a landlord might be called upon to meet the cost of fire

escapes if the lessee decided to open a rooming house. If that use proved unprofitable, the tenant might use the property as a theatre or picture show and the landlord would be compelled to provide such additional exits and escapes as the statutes and ordinances require, or, that venture failing, he might be called upon to meet the expenses of adapting the premises to the requirements of a restaurant if the lessee wished to engage in it.

In the *Hayton* case, it was held that a *permission* to use the property leased for saloon purposes did not restrict the use of the premises for other lawful purposes, and a retirement from that business under compulsion of the local option law did not terminate the lease. The governing principle, *i. e.*, a landlord will not be held to meet the burden of an exercise of the police power, would seem to apply here.

In the *Rockwell* case, there was no restriction upon the use of the demised premises. It was alleged that the property had been used for public shows and entertainments; that the lessor knew that the property had been leased for the purpose of carrying on a moving picture show; that the lessee did not know, and the lessor did not disclose to him, that the premises could not be so used or be used for the entertainment of audiences "until an exit for escape in case of fire" had been made in the building. It was agreed in the lease that the lessee should make repairs and permanent improvements. The lessor refused to make the exit at its own expense when notified by the chief of the fire department to do so. An action was brought as for an abandonment of the lease by the lessor. We held:

"That the use of the premises was not limited by the terms of the lease; that the lease is complete in itself; that the respondent did not engage to make any repairs or improvements upon the premises; that the appellant did engage to make certain improvements; that both parties were bound to take notice of the police regulations of the city where the subject-matter of the contract was situated; that there is no

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avermment that the respondent misled the appellant, or that it refused to permit him to construct the exit upon the wall of the building without the terms of the lease; that upon the cancellation or surrender of the lease, the appellant was obligated to pay all rent that had accrued by the terms of the lease, and that the complaint, when read with the lease, shows no breach of any of its terms or of any legal duty upon the part of the respondent."

The logic of this decision is that parties may make any lawful contract and, in the absence of a stipulation specifically covering the disputed right, the contract is made subject to, and with implied knowledge of, police regulations, present and prospective, which may affect the use of the property while subject to the tenancy.

The *McManamon* case rests upon the same principle. There the building was, by apt terms, let for hotel purposes and such business as is generally incident to the hotel business. It could not be used for any other business without the written consent of the lessor. There as here the agency of the state, exercising its police power, made certain demands in the interest of the safety of guests and patrons. Here we have an order to install an additional fire escape; there the order was to provide ventilation in certain of the bedrooms, which if complied with required changes and alterations—permanent improvements, considering the use to which the lessor had restricted the use of the building. It was held, upon the ground of insufficiency of the evidence, that a recovery for the expense of the alterations and improvements could not be had. It may be said *arguendo* that a recovery should have been allowed irrespective of the contract if the theory of the Purcell Company is a correct conception of the law, for the improvement was of a permanent character, not within the contemplation of the parties except as the law charged them with notice of possible safeguards in aid of patrons of the hotel. The *McManamon* case is an apt authority to sustain our reasoning that, while there may be a

contract liability for improvements, no such liability arises under the statute where the improvement is compelled by public authority as an incident to the use to which a tenant puts the property.

Counsel for the Purcell Company have cited many cases, *Zeibig v. Pfeiffer Chemical Co.*, 150 Mo. App. 482, 131 S. W. 131, being a fair type of all of them, to sustain its contention that where a statute is in terms similar to Rem. & Bal. Code, § 6040 (P. C. 243 § 21), that is,—“every owner, manager, agent or person in charge of a hotel who shall fail to comply with any of the provisions of” the law shall be guilty of a misdemeanor, puts the burden of providing and paying for any improvement which becomes a permanent part of the structure upon the owner of the property. The whole contention of the Purcell Company is stated in the *Zeibig* case:

“As between the owner and the lessee, aside from any contract, the obligation of the law is not identical with that which obtains with reference to the public, for in such circumstances the duty of constructing the fire escape rests primarily upon the owner of the property. . . . It is true, as a general proposition, that by the common law the burden of repairs on the demised premises rests upon the tenant, and, unless he covenants to do so, the landlord is not required to construct appurtenances nor repair the premises after having placed them in the possession of the lessee. . . . But to this general rule there is a well established exception which obtains with respect to the construction of such permanent improvements or fixtures as fire escapes, where the duty is enjoined by a positive statute as here. . . . It thus appears that as between the plaintiff owner and the defendant lessee the obligation to construct the fire escape primarily obtains against the owner of the property and no recovery may be had against the defendant on account thereof unless it covenanted to do so. The mere fact that defendant leased the premises for business purposes with knowledge that the fire escape which the law required had not been constructed will not imply a covenant to the effect that it should assume the

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burden suggested; for implied covenants in leases are such only as the law raises from the relation of the parties or from the use of certain terms in establishing that relation."

Other cases relied on are: *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Johnson v. Snow*, 201 Mo. 450, 100 S. W. 5; *Carrigan v. Stillwell*, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 85 Am. St. 357, 58 L. R. A. 277.

The *Zeibig* case, as well as the *Arms* case, fell under a statute which required the owner or lessee of *all* buildings having a height of three or more stories and used for business purposes to provide outside fire escapes. It is distinguished because the statute makes a fire escape a component part of, and presumptively a benefit to, a structure irrespective of particular use.

The *McAlpin* case and the *Willy* case were decided under an act chartering the city of Brooklyn. It provided that *any* dwelling house of more than two stories in height, and *any* building of more than two stories in height, when occupied as a hotel, boarding or lodging house, factory, mill, offices, manufactory, or workshops, shall be provided with fire escapes, etc.

The *Landgraf* case, was also a case under a statute providing that "*all* buildings in the state which are more than four stories, etc.", shall be provided with fire escapes. Owners, trustees, lessees and occupants were made answerable to the law.

In the *Carrigan* case, the controlling statute was comprehensive. It required fire escapes to be put upon "*every* building upon which *any* trade, manufacture or business is carried on, etc." Unless these cases fit our statute, they cannot be held to be controlling for admittedly there is no common law liability. *Landgraf v. Kuh*, *supra*; *Pauley v. Steam-*

Gauge & Lantern Co., 181 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661.

Chapter 29, Laws of 1909, p. 43, is made by its terms applicable to a business, and not to *any* or *all* buildings. The title of the act is,

“An act relating to hotels, inns and public lodging houses, creating the office of State Hotel Inspector, and providing penalties for the violation thereof, and making an appropriation therefor.”

It provides for fire escapes, rope escapes, fire extinguishers, gongs, a sufficient supply of bedding and towels; the dumping of ashes; for disinfection and fumigation after contagious diseases; for sanitation and sanitary plumbing; for inspection, and, following a failure to observe the demands of the law, it provides:

“Sec. 17. Any owner, manager, agent or person in charge of a hotel who shall obstruct or hinder an inspector in the proper discharge of his duties under this act, or who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10) nor more than one hundred (\$100) dollars or shall be imprisoned in the county jail for not less than ten days, nor more than three months or both.” Rem. & Bal. Code, § 6046.

This section, when taken in connection with the other sections of the act, must mean the owner of the hotel business and not the owner of the building, for surely the lessor would not be punished for failing to properly plumb a building, or to furnish fire extinguishers, gongs, or rope fire escapes to meet the necessities of the lessee's business.

The distinction between the cases relied on and the one at bar is noticed in *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, where, under a statute providing that

“Any owner or agent for owner of any factory, workshop, tenement house, inn or public house, if such factory, work-

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shop, tenement house, inn or public house be more than two stories high, to provide . . . a fire escape"

it was held:

"The owner of a building and the owner of a factory which is conducted in the building, may be different persons, and when this is so, the owner of the factory and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty. . . . Again, in the absence of all legislation on the subject, the common law, founded on principles of right and justice, implies, from the relation of master and servant, a duty on the former to provide reasonable means for the safety of the latter. Hence it is more reasonable to infer that the legislature intended to impose the duty required by this statute upon the owner of the factory, who assumes the relation of master to those employed therein, and for whose safety the duty imposed by this statute is enjoined, than to hold that it was intended to impose the duty upon the owner in fee of the factory building, who may not sustain any relation to the employees in the factory from which the duty to provide for their safety could be implied, and who may not even know that his building is being used as a factory or workshop."

We assume that the same rule would apply as between inn-keeper and guest. To the same effect is *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201:

"A number of authorities were cited showing the construction which has been placed upon the word 'owner' both by the legislature and the courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainder man in fee is each an owner. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. When, therefore, the legislature used a term of such varied meaning we must presume they intended such an owner as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the man-

ner of whose use of it makes a fire-escape necessary. Had the owner in fee been intended it was easy to have said so. This view meets all the requirements of the act. It places the responsibility where it properly belongs, upon the person in the possession and occupancy of the property as owner for the time being, and the nature of whose business renders the erection of fire-escapes necessary to protect the lives of his employees."

This case was followed in *Kelly v. O'Conner*, 106 Pa. St. 321, where it was said:

"The Act of 1879 is certainly a highly penal statute; it imposes a duty unknown to the common law, and cannot be extended by implication to parties who do not clearly come within its terms; the authorities which have been cited are cases involving common law liabilities, and we do not think they have application here."

In all of the cases relied on, the lessor was held because the law charged the improvement against the building irrespective of the character of the business, or because it was of a certain height, while with us the additional fire escape is required under a special statute, and only in consequence of the particular business in which the lessee may engage and in which the lessor has no interest.

Our conclusion seems to us to be sustained by the better reason. In the case at bar, the lessee took the property *caveat emptor*. It knew that, in the exercise of its contract, the state or municipality might from time to time make demands in the interest of safety, and which might involve expense. The law rests upon the theory of benefit to property or business. It cannot be assumed that the improvement will be of benefit or use to the lessor at the expiration of the lease in 1921. Shifting trade centers, more engaging offers of rent from mercantile establishments, warehousemen, and wholesalers, might make the premises no longer adaptable for hotel purposes, thus rendering the additional fire escape no longer a necessity under any law or any ordinance of the city. We would then have the utterly un contemplated result,

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a landlord meeting an expense for an improvement beneficial and necessary only to his lessee and from which he would reap no benefit or advantage now or hereafter.

A judgment has been heretofore entered affirming the judgment of the court below as to the Purcell Investment Company. The judgment of the lower court as to the Yukon Investment Company is reversed, and the case is remanded with instructions to dismiss as to it.

Crow, C. J., GOSE, MORRIS, and PARKER, JJ., concur.

[No. 12169. Department One. January 11, 1915.]

PUGET SOUND REALTY ASSOCIATES, *Respondent*, v. FRED W. CATLETT, *Receiver etc., et al., Appellants*.¹

CHattel Mortgages — CONTRACT CREDITORS — DEFECTIVE REGISTRATION—PRIORITIES. Where a chattel mortgage is a valid and subsisting lien as between the parties thereto, simple contract creditors who dealt with the mortgagor cannot urge a superior equity by reason of slight imperfections in the records of instruments resulting from a change of the name of the mortgagor from The Blackwell Hotel Company to Blackwell Hotel Company, unless they show that they were actually misled by reason of such imperfections.

SAME—MISREPRESENTATIONS OF MORTGAGOR. Representations by a mortgagor to creditors that his personal property is free from lien are not binding on the mortgagee when not authorized by him.

APPEAL AND ERROR—HARMLESS ERROR—ALLOWANCE OF DAMAGES. Although damages in the sum of \$4,000 for detention of premises beyond the term of lease may be excessive, its allowance is without prejudice in an action for rent and the foreclosure of a chattel mortgage on the lessee's furniture, where the property on sale brought less than the rent actually due.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 14, 1914, upon findings in favor of the plaintiff, upon a contest between creditors and a mortgagee in receivership proceedings, tried to the court. Affirmed.

¹Reported in 145 Pac. 617.

Fred W. Catlett, Hughes, McMicken, Dovell & Ramsey, Tucker & Hyland, and Higgins & Hughes (Hyman Zettler, of counsel), for appellants.

Corwin S. Shank and H. C. Belt, for respondent.

CHADWICK, J.—Stating the facts briefly so as to get at the underlying legal propositions, rather than following the mutations and character of the property out of which this appeal comes, we find: that an owner sells a hotel business to his lessee; the lease is in form a lease and a chattel mortgage, and is recorded as such; lessee thereafter changes its name for reasons not now material, from The Blackwell Hotel Company to Blackwell Hotel Company; the furniture in the hotel was covered by conditional bill of sale; the purchase price is thereafter paid. A bill of sale in form:

“does hereby sell, assign, transfer and set over unto the said Blackwell Hotel Company in accordance with and as required by said contracts of conditional sale all the personal property so conditionally sold and described in said conditional sale contracts,”

is executed and delivered to the lessee. The lessee, Blackwell Hotel Company, in the regular course of its business, contracts many debts, and is owing a number of creditors on October 10, 1913, when the plaintiff, the present lessor, began an action to foreclose the chattel mortgage on the furniture and fixtures to satisfy an arrearage of rent amounting to \$23,036.30, and \$4,000 damages for detention beyond the term of the lease. The lessee being insolvent, plaintiff lessor asked the court to appoint a receiver to care for the property pending foreclosure. The receiver took charge and has, so far as we can ascertain from the record, acted as a general receiver.

When the application for a receivership came on for hearing, the defendant creditors appeared and contested the mortgage and the right of the plaintiff lessor to recover. They contend that the familiar principle of the law that

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where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. They cite *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538; *Parker v. Hill*, 68 Wash. 134, 122 Pac. 618. Appellants undertake to apply the rule in this wise: the change of name from The Blackwell Hotel Company to Blackwell Hotel Company was procured in part, at least, by respondent; the legal consequence was that the record did not indicate an existing mortgage made by Blackwell Hotel Company, the debtor of these appellants, and further, that the execution of the bill of sale to Blackwell Hotel Company covering the property theretofore held under the conditional bill of sale by The Blackwell Hotel Company put upon Blackwell Hotel Company full indicia of ownership, and those dealing with it should be entitled to protection over a mortgagee who had made that situation possible.

However engaging the theories advanced by appellants may be, we are nevertheless of the opinion that the judgment of the trial court is correct. It is admitted that the mortgage as between the parties is a valid and binding instrument. This being so, a superior equity cannot be asserted by simple contract creditors making proof of the recordation and character of the subsequent instruments. To invoke equity they must come forth and show that they were in fact misled by the record and indexes which they claim to be deficient. If it were not so, mortgaged property could not be sold with safety to the mortgagee. The law invites transfers of personal property and, in the absence of a showing that would sustain an estoppel *in pais*, no court should say that the integrity of the contract and transaction between mortgagor and mortgagee should be beaten down and destroyed by those who rely upon imperfections afterwards discovered and which in no way entered into the trade out of which their obligation arose.

We have not overlooked the contention of the attorneys for the appellants that manager Blackwell told them that the property was free of lien. Admitting that the record shows this to be true, although it is extremely doubtful if a finding to that effect could be sustained, it would not destroy the lien of plaintiff's mortgage. It is not contended that Blackwell had any authority from the mortgagee. It is not contended that plaintiff has not, and did not have during all that time, a valid and subsisting mortgage, and furthermore, admitting that such a representation was made, men who depend upon the veracity of those with whom they deal cannot expect lien holders to waive their rights in order to amend the falsehood of the common debtor.

There is a further contention that fifty per cent or more of the property which has been sold by the receiver to satisfy the debt was put into the building after the mortgage was executed, and an argument is made and authority cited to the effect that such property is free of the lien of the mortgage. Mr. Blackwell, when on the stand, testified that some \$40,000 worth of property had been put into the hotel after the execution of the mortgage. Upon cross-examination he failed utterly to sustain this contention. His testimony is extravagant and indefinite. It was rejected by the trial court and will not be followed by us.

Appellants contend that in any event plaintiff has undertaken to charge the property with too much; that the \$4,000 asked for damages for detention beyond the term cannot be allowed by the court. It is asserted in the briefs, and it is not denied, that the property has been sold and brought less than the amount of rent actually due. If this is so, there can be no prejudice to the appellants.

We find no error in the record. Affirmed.

Crow, C. J., Gose, PARKER, and MORRIS, JJ., concur.

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Syllabus.

[No. 12343. Department One. January 11, 1915.]

HENRY MALLORY *et al.*, *Appellants*, v. THE CITY OF
OLYMPIA, *Respondent*.¹

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—IDENTITY OF ISSUES. A judgment of dismissal in an action to recover on an express contract for the construction of a local improvement, is not *res judicata*, so as to bar a second action to recover the reasonable value of labor performed and material furnished which the city had taken advantage of in the completion of the improvement, where the only issues tendered in the former action were that the contract had not been performed according to its terms, and that the city had a right to take the work over at any time it might decide that it was not being done properly and finish it at the cost of the contractor and his bondsmen, and where the court made no findings as to the amount due on the contract, and did not pass upon the amount due for labor and materials furnished, but dismissed the action on the plea of abandonment (in the nature of a plea in bar) on the ground that the contractor had been guilty of a fraud and had abandoned the contract.

SAME—IDENTITY OF ISSUES—EVIDENCE TO SUSTAIN. In such a case, under the test as to whether the same evidence would have maintained both actions, the first judgment would not be a bar to the second action, unless, to meet the plaintiff's *prima facie* case on the contract and performance, the city should prove that the work had not been completed to its satisfaction and it had completed the work at a cost and damage to the city that would offset the contract price, in which action the value of the goods and labor was immaterial; while in the second action the contract and performance was immaterial, and use by the city of materials and labor furnished and their reasonable value made a *prima facie* case for the plaintiff.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ABANDONMENT—ACCEPTANCE OF BENEFITS—QUANTUM MERUIT. As cities should be held to the same standard of morals imposed by law on individuals, an action on *quantum meruit* for the value of labor and materials, furnished by a contractor for a local improvement and utilized by the city in completing the work, may be maintained against the city; and the city, in accepting the benefits of the contractor's labor and materials, is not in a position to urge fraud of the contractor in attempting to bribe the city engineer as a defense to the action.

¹Reported in 145 Pac. 627.

Appeal from a judgment of the superior court for Thurston county, Albertson, J., entered June 9, 1914, dismissing an action on contract, tried to the court. Reversed.

Troy & Sturdevant and *Thomas M. Vance*, for appellants.

George R. Bigelow and *Frank C. Owings*, for respondent. The rendition of judgment against a contractor in an action on a contract for public work is *res judicata* of a subsequent action by him seeking to recover the value of labor and material furnished by him. *Hawkins v. Reber*, 81 Wash. 79, 142 Pac. 432; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Bowen v. Kimbell*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. 302; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Sipley v. Stickney*, 190 Mass. 43, 76 N. E. 226, 112 Am. St. 309, 5 L. R. A. (N. S.) 469; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437, 72 Am. St. 865, 43 L. R. A. (N. S.) 810; *Huyett Smith Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. 272; *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 South. 1016; *In re Murray's Estate*, 56 Ore. 132, 107 Pac. 19; *Steeple v. Newton*, 7 Ore. 110, 33 Am. Rep. 705; *Simpson Construction Co. v. Stenberg*, 124 Ill. App. 322. Where a municipality enters into a contract with a contractor, and the contractor is to be paid by a special assessment, and the contractor afterwards abandons his contract, recovery will not be permitted on *quantum meruit*. *Snouffer & Ford v. Tipton*, 150 Iowa 73, 129 N. W. 345, Ann. Cas. 1912 D. 414; *Kelso Co. v. Gillett*, 136 Cal. 603, 69 Pac. 296; *Detroit v. Michigan Paving Co.*, 36 Mich. 335; *Henderson v. Lambert*, 77 Ky. 24; *Berwind v. Galveston & H. Inv. Co.*, 20 Tex. Civ. App. 426, 50 S. W. 513; *Denver v. Hindry*, 40 Colo. 42, 90 Pac. 1028, 11 L. R. A. (N. S.) 1028; *City of Auburn v. State ex rel. First Nat. Bank*, 170 Ind. 511, 83 N. E. 997, 84 N. E. 990.

CHADWICK, J.—This action was begun by appellants after this court had rendered a judgment adverse to appellant

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Mallory. *Mallory v. Olympia*, 75 Wash. 245, 134 Pac. 914.

Plaintiffs seek to recover the reasonable value of labor performed and material furnished to a local improvement district in the city of Olympia, popularly known as the Swantown slough. The case reported in 75 Wash. 245, was a proceeding in mandamus. Plaintiff Mallory prosecuted that case in his own name. The record shows, and it is admitted by all sides, that Martin was a silent partner, and that he has met the burden of financing the contract which Mallory assumed to carry out. The city has made substantially the same answer in this case as it made in the mandamus case. When this case came on for hearing, it was stipulated that the pleadings and testimony taken in the former case might be introduced as evidence, whereupon counsel for the city moved for a judgment upon the ground that the former judgment was *res judicata* of all claims and demands that might be made by the plaintiffs. The court was of that opinion, and a judgment dismissing the action was entered.

It is not disputed that an action prosecuted upon an express contract will not bar an action upon *quantum meruit*. *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; *Egbers v. Fischer*, 73 Wash. 308, 131 Pac. 1128; *Buddress v. Schaffer*, 12 Wash. 310, 41 Pac. 43. This upon the theory that a party is not put to the hazard of invoking every possible remedy when seeking redress, nor suffer dismissal without remedy because he has invoked one which cannot be sustained in law. 15 Cyc. 262.

In determining whether the plaintiffs are concluded by the former action, we must look to the character of the action, the issue joined, and the judgment entered. Stripped of all verbiage and fine distinctions, and treating the mandamus proceedings as a civil action under the statute (*State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207) the former proceeding was an action upon an express contract, to which the city tendered two issues, first, that the contract had not been performed according to its terms, and second, that,

under the terms of the contract, the city had a right to take the work over at any time it might decide that it was not being done properly and finish it at the cost of the contractor and his bondsmen. When the case came on for trial, the court made no findings, nor were any invited, as to the amount due on the contract and the amount that might be properly set off against the contract price, but entered a judgment holding that Mallory had been guilty of fraud and that he had abandoned his contract. For these reasons, and these alone the action was dismissed. The real controversy so far as an issue was tendered touching the amount due for labor or material honestly and actually furnished, was not passed upon by the court.

Res judicata is, "a matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judicial decision." 84 Cyc. 1666.

"A fact or question which was actually and directly in issue in a former suit, and was there *judicially passed upon and determined* by a domestic court of competent jurisdiction." 23 Cyc. 1215.

Can it be said that anything that is urged in this case was settled or decided by the court in the other case? The only possible theory that can be advanced against the right of appellants to maintain this action is that the judgment is conclusive of all things decided, or which might have been decided, in the former case. We have shown that the real issue between the parties was not decided, nor can it be held that it might have been decided. The plea of abandonment was in the nature of a plea in bar. When the court found that there had been an express contract and that it had been wilfully abandoned, the legal conclusion followed that a recovery could not be had upon the express contract. Therefore, the question of *quantum meruit* could not have been decided in the former action. The city asked no findings upon its present theory of the case, but was content with all that the law gave it, a judgment of dismissal. The merits of

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the case, either upon express contract or implied contract, were not "judicially passed upon and determined." Consequently, it cannot be said that the merit of the case and any possible issue joined inhered in the judgment because it might have been passed on. Our decision upon the appeal in the former case is drawn upon the theory that the finding of abandonment was a bar to a judgment upon an express contract. We there said:

"When, therefore, the appellant persisted in following his own plan and ignoring that of the city engineer, he in law wilfully and fraudulently violated his contract, and cannot make it the basis for now insisting that the city make him the payments specified to be paid him upon the completion of the contract." *Mallory v. Olympia, supra.*

We can find nothing in the law or in the record in this case that would bar an inquiry or prevent a recovery upon an action for *quantum meruit*. It is not denied that the appellants furnished labor and material of great value to the improvement district and which it is using in the exercise of its public functions. It may be admitted that the city has not received that for which it contracted, but it has received that which, by the exercise of its privileges under the contract, it has made to conform to its demands and for which it should pay a sum equal to its reasonable worth and value.

In determining whether the former judgment is *res judicata* we are not limited to an inspection of the judgment alone, for the parties have saved all legal questions as to the power of a court to go beyond the judgment, by stipulating that we may consider the pleadings as well as the judgment in the former case.

The words "the plaintiff wilfully abandoned his work under said contract and wholly failed to complete said contract in accordance with the plans and specifications and to the satisfaction of the city engineer," considered in the light of the pleadings, make it plain that the issue before the court was whether or not the contract had been completed according

to the plan. The contractor said it had. The engineer said it had not. We have no right to say, nor had the court in the former case, under the pleadings, the right to say, that there was a wilful abandonment. There was a dispute as to whether the work had been completed, and nothing more. A fault in this case from the beginning has been that, upon the hearing, it appeared by the testimony of the city engineer that Mallory had offered him a sum of money if he would approve the work. From this an inference of fraud has been drawn and allowed to run through the whole case, whereas, if it is true in fact, it occurred after the work had been done and is evidentiary matter going only to the credibility of the witness. Whether the contract was in fact performed according to the plans and specifications is a matter entirely separate and apart.

In *Buddress v. Schafer, supra*, it is said:

"To determine whether a former judgment is a bar to a subsequent action, it is necessary to inquire whether the same evidence would have maintained both of such actions."

It is unnecessary to multiply authorities. This principle is laid down by every text writer and sustained by all authority. It is the primary test of *res judicata*. Let us apply it.

In the first case, it was incumbent upon plaintiff to prove the execution of his contract and to testify that his work had been performed. This made a *prima facie* case. Defendant, on the other hand, must prove that the work had not been done to the satisfaction of the city and had been completed at a certain cost and damage to the city, so that a judgment for the contract price would be offset, under the terms of the contract, by the cost to the city of making the work consistent with the plans and specifications. The value of the goods and the labor that went into the work were not material to the issue.

In this case, applying the same test, the terms and conditions, the time and manner of payment, and all details of

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the contract are immaterial. When plaintiffs show that they have furnished materials and labor which the city has put to its uses and has not paid its reasonable value, they have made out a *prima facie* case. Neither does the defense rest in contract, but would go only to the value of the labor and material less the damages and expenditures the city had been put to in adapting that labor and material to its final use.

This court has endeavored to hold municipalities to the same standard of right and wrong that the law imposes upon individuals. *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999; *Coliseum Inv. Co. v. King County*, 72 Wash. 687, 131 Pac. 245; *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820. In *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, it was sought to enjoin the execution of a contract on the ground that it had not been let in accordance with the requirements of the statute. The court found that the controlling statutes were in fact violated and that the contract was void. Certainly a contract substantially performed, although held to be abandoned, stands upon no lower plane than a void contract. Yet, notwithstanding, we said:

"This court has adopted the more equitable doctrine of allowing the parties, where the contract is entered into in conformity with the statutes would not have been unlawful, to retain from the moneys received by them a sum equivalent to the reasonable value of the property the county acquires and retains in virtue of the execution of the void contract. . . . So in this case, since the county has accepted and made use of the bridge, it is liable to the builders for its reasonable value."

We take it that the trial judge rested his judgment upon the case of *Hawkins v. Reber*, 81 Wash. 79, 142 Pac. 432. In that case it is granted that a former suit upon an express contract is not a bar to a second suit upon *quantum meruit* for the same services when it takes different evidence

to establish it. It was held that the case did not fall within the rule. The former judgment was held to be *res judicata* because the controversy turned on a question of fact, whether there had been a mutual and voluntary settlement of all differences and disputes between the parties. The court held in the first case that there had been, and the effect of our holding was that a party could not relitigate a question of fact which had been judicially passed upon and determined by casting his pleadings in a new habit; whereas, in this case no question of fact has been determined other than the fact of abandonment, from which the court drew the legal conclusion that the action should be dismissed. Appellants are bound to accept that judgment, but they are not precluded, under the authorities and the fundamental principles of the law, from asking a court of competent jurisdiction to try the merit of the case presented.

It may be that Mallory did all that is claimed; that he did not follow the directions of the city engineer as they were given from day to day, and that he offered a bribe to the city engineer if he would approve the work; but it ill becomes a city to appeal to that fact to justify a taking of that for which it is rendering no recompense to the one whose money has gone to pay for the improvement and who is innocent of all wrong. Such a course is not justified by reference to any provision of the contract, nor can it be sustained by reference to any principle of the common law or equity. It should not be urged by man or municipality, nor should it be tolerated in a court of law.

It is further contended that, the court having found that the plaintiff abandoned his contract the plaintiffs cannot recover upon the theory of substantial performance. Many authorities are cited to sustain this rule, and it may be that no cases can be found where the doctrine of substantial compliance has been applied where there was an intentional and fraudulent failure to comply with the terms of the contract. The fault in this reasoning is that plaintiffs are not seeking

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to recover upon the theory of a substantial performance of a contract or upon a contract at all. As we have shown, there was no real question of abandonment in the full sense of that word, but a question of whether the work had been performed. But granting that there was an abandonment and that the city can raise the question of substantial performance, it is in no better position. We must look to the record in this case for the premise to sustain the applicable law, and when we do, we find this case is distinguished from all the cases relied on by counsel as well as the ultimate holding in *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184. If there had been no contract, or if the contract were silent as to the procedure in the event of a dispute over the fact of performance, we could admit that there could be no recovery where the contractor had been guilty of fraud in the prosecution of his work or had abandoned his contract. The city cannot plead or urge in this court the doctrine of substantial performance without pleading and relying on the contract.

The court, in the case of *Mortimer v. Dirks*, says of the rule allowing a recovery where the contract has been substantially performed,

“But such a rule, being founded in equity, is for the benefit of those who do equity, and it cannot be invoked by those who wilfully and intentionally violate and breach their contracts.”

The contract of the city to pay for the work necessary to make it conform to its idea of the plans and charge it against the contractor and his bondsmen is as sacred and binding as was the contract of the contractor to do the work according to the plans and specifications. In the *Mortimer* case, the equities were upon one side. In this case, there are equities upon both sides. The equities are equal and the law should prevail. The city should not be allowed to take labor and property upon the theory of moral wrong practiced by the contractor, while it is repudiating an express contract to do the work in its own way and charge the cost and no

more against the contract price, or, if this action prevails, against the reasonable value of the labor and material.

The judgment of the lower court should be reversed, with instructions to take testimony as to the reasonable value of the labor and material, subject to all lawful offsets, so that an assessment can be made against the improvement district according to benefits to pay the amount due.

Crow, C. J., Gose, and PARKER, JJ., concur.

[No. 12357. Department One. January 11, 1915.]

CLARA E. CRANFORD, *Respondent*, v. JOHN H. O'SHEA,
Appellant.¹

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. The admission of evidence in a malpractice case that defendant was negligent in not having X-ray photographs taken of the injury is harmless, where there is independent evidence tending to show negligence and the testimony would probably go only to the quantum of damages, affirmance of which was conditioned on remission of a part.

SAME—FAILURE TO INSTRUCT. Failure to instruct as requested that defendant in a malpractice case knew of the fracture of the femur, but could not heal it because of the synovitis of the knee joint and the condition of the fracture below the knee, was not prejudicial, where the case went to the jury after a long trial in which every feature of plaintiff's case as well as the defense was prominently and skillfully brought out.

EVIDENCE—JUDICIAL NOTICE—PHYSICAL SUFFERING. Courts will judicially notice that a compound comminuted fracture of the lower limb and a fracture of the femur are painful injuries, occasioning long suffering, although treated with the best of surgical skill.

PHYSICIANS AND SURGEONS—MALPRACTICE—LIABILITY. A physician called to treat a person is liable only for the suffering caused by his own negligent acts, and not for that caused by the original injury.

PHYSICIANS AND SURGEONS—MALPRACTICE—EXCESSIVE DAMAGES. A verdict for \$7,385 for malpractice is excessive and should be re-

¹Reported in 145 Pac. 579.

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duced to \$5,385, where, in treating a fracture of the lower limb, the surgeon omitted to treat a fracture of the femur, which knit in such a way as to require breaking and cutting the two ends by another surgeon in order to accomplish a good recovery.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 28, 1914, upon the verdict of a jury rendered in favor of the plaintiff for \$7,385, in an action for malpractice. Reversed unless \$2,000 is remitted.

Lloyd E. Gandy and Graves, Kizer & Graves, for appellant.

Attwood A. Kirby and H. M. Stephens, for respondent.

CHADWICK, J.—Appellant is a surgeon, engaged in the practice of his profession. He is sued for malpractice. On January 17, 1910, respondent was injured in a coasting accident. Both bones of one of her lower limbs were fractured just above the ankle. The fracture is denominated by the medical witnesses a compound comminuted fracture. The flesh was torn and the bone protruded. There was also a simple fracture or a nearly square break of the femur a short distance above the kneejoint. Appellant was, at the time of the accident, surgeon at the emergency hospital, and gave respondent first aid and thereafter treated her for four or five weeks, when she was passed to the care of the county physician, who cared for her until Dr. Phy, a surgeon of her own choosing, took charge of the case.

So far as we can see, the fracture of the two bones in the lower limb was treated surgically, and but for an infection that appeared two or three days after the accident and for which appellant is not shown to be responsible, respondent would have recovered of that fracture in from six to twelve weeks. The malpractice is alleged to lie in the fact that appellant did not make timely discovery of the fracture of the femur and did not, after discovery, render proper and skilled service. On February 2 or 3, X-ray photographs were taken.

Thereafter respondent's limb was set and put in a cast. It so continued until after the case passed to the charge of the succeeding doctors. After several months, Dr. Phy had X-ray pictures made, and it was found that the fractured femur had slipped out of place and, being held by the contracted muscles, had knit or formed a union. This union was broken up by Dr. Phy, who cut the two ends, slightly shortening the length of the two pieces, which he held in place by plates riveted into the bone. The limb is now straight instead of bowed out as it had been and, but for the shortening and a slight probability of future trouble, is what is called a good recovery. Appellant insists, that he knew of the fracture of the femur; that he discovered it at the time he first examined the patient; that he could not have failed to see it as it was "laid out before him." In this he is corroborated by the assisting surgeon and by the surgical nurse who was present. But the jury believed the respondent and her mother, who testified that appellant did not examine or give any attention to the upper fracture, although respondent continuously complained of the pain and suffering she endured at the place of the fracture.

Appellant's version is, that the lower fracture was the important thing; that the knee became immediately swollen, and that a synovitis of the knee joint developed; that because of the swelling and synovitis, he could not set the bone at the time by ordinary methods, nor could he attach a weight to the limb to hold the fractured bones in place because of the fracture and lacerations below the knee. Respondent's present condition is: the upper fracture has made a good recovery; the lower fracture, after an operation in which the bones were cut and reunited, has healed; the limb is shorter than the other from one and one-half to two and one-half inches as variously estimated by the witnesses; she walks with, and bears most of her weight on, a cane which she carries at her hip; she can walk without help, though she can walk better with assistance; she was bedridden for many

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months, and has suffered, and still suffers, acute pain; her knee is slightly larger than its companion and she cannot bend her ankle up, although she can bend it down, so that when going upstairs she has to carry the injured limb after the other. Respondent asks for damages for pain and suffering. It is not shown that she lost any earning time or wages on account of the injury. The case was here on defendant's appeal, *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486, and was reversed and remanded for a new trial, with the same result except that the jury substituted the sum of \$7,385 for the \$5,000 allowed on the former trial.

It is urged that the court erred in allowing evidence to be received tending to show that appellant was negligent in that he did not have X-ray pictures taken at the time or shortly after the case came under his notice; that the court did not properly instruct upon this feature of the case; and that the court erred in submitting the issues to the jury, in that he failed to state appellant's contention that he knew of the fractured femur but could not heal it because of the synovitis of the kneejoint and the condition of the lower fracture. As for the first contention, we think it would have been better if the court had sustained appellant's objections and had given his requested instructions, but as there is independent evidence of negligence and the testimony would in all human probability go only to the quantum of damages, we have decided, in view of the conclusion we have reached, to treat the act and refusal of the court as not sufficiently prejudicial to justify a third trial of the case. As for the last contention, the case went to the jury after a long trial. Every feature of respondent's case as well as the defense was prominently and skillfully brought out. We cannot believe the jury were unmindful of, or failed to consider, appellant's case. In this respect we find no error.

This brings us to the real contention. Are the damages awarded excessive? It is fundamental that a doctor who is called to treat an injured person cannot be held to answer

for the suffering caused by the original injury, but only for the suffering caused by his own negligent acts. *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406; *Rice v. Puget Sound Traction, Light & Power Co.*, 80 Wash. 47, 141 Pac. 191. The theory being evident, the original injury, in so far as the attending surgeon is concerned, is regarded as if it were self-inflicted. All hurts requiring surgical care are presumptively painful and tormenting. It can be judicially noticed that a compound fracture of the lower limb and a fracture of the femur are painful hurts, and will occasion long suffering although treated with the best of surgical skill. In the instant case, appellant is not responsible for the original injury, or the infection which prolonged the healing of the lower fracture indefinitely and which made a surgical operation upon it necessary, or for the six to twelve weeks of confinement during which the bones might have knit under the most skillful treatment had there been no infection. In fact, the negligence of which the jury found appellant guilty cannot be made to extend beyond his treatment, or as it is found, his lack of treatment, of the fractured femur which, barring the slight shortening of the limb made necessary to square the bones, is a fair recovery, and the added pain and suffering. Considering recoveries in cases where the injuries were of like nature and for which the party charged was solely responsible, we are constrained to believe that the jury, in pity for the respondent, visited the whole consequence of her hurts and suffering upon the appellant, without appreciating the demand of the law that respondent bear her share of the misfortune which angry chance threw over the unlucky parties to this action. *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476, is, in so far as the consequences of the injury are concerned—an injury for which defendant was responsible—most like this case. We there allowed a recovery of \$5,000. It has seemed to us that a recovery of more than \$5,385 is not justified by the record in this case.

A motion for a new trial was taken under advisement by

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the trial judge, after saying, "To tell you the truth, Mr. Stephens, the girl is fortunate to be alive with any kind of a leg." After reading the case of *Froman v. Ayars*, 42 Wash. 385, 85 Pac. 14, in connection with the *Mueller* case, the court allowed the verdict to stand. The opinion in the *Froman* case admits that a verdict "manifestly too large" should be reduced. The surgeon was there charged, and the jury found, that but for the malpractice, the plaintiff would not have lost his foot by amputation. A life expectancy and the earning power of a common laborer were proved. The holding of this court was rested on that circumstance. "To pass through twenty-six years of life without a foot is a condition that we may assume no man, however humble his occupation, would be willing to accept for \$5,000," said the court.

We have not overlooked the contention that, when the trial judge has refused to reduce the verdict we will not, and the cases cited to sustain it. In the cases relied on, the party charged was primarily responsible, the testimony conflicting, and we could not say, nor would we say if this case were against one responsible for the original hurt, that the verdict is too large; but bearing as she must her own share of the attendant and consequent suffering, we think respondent, who can claim no more than compensation, should remit \$2,000 of her recovery or take a new trial. It is our judgment that the jury was moved by the passion of sympathy for respondent and possibly by the passion of prejudice against appellant.

If the respondent will, within thirty days after the remittitur in this case goes down, remit \$2,000 of her judgment and consent to the entry of a judgment for \$5,385, the judgment will be affirmed. Otherwise a new trial will be awarded.

CROW, C. J., PARKER, GOSE, and MORRIS, JJ., concur.

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[No. 11885. Department One. January 11, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. J. W. JACKSON
et al., *Appellants*.¹

CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTION—INCRIMINATING EVIDENCE—DEMAND FOR PRODUCTION. Under the Federal and state constitutions providing that no person in any criminal case shall be compelled to be a witness against himself, a demand upon defendant, in the presence of court and jury, to produce documents which will tend to criminate him, invades the defendant's constitutional grant of immunity, and hence constitutes reversible error.

WITNESSES—PRIVILEGE—RIGHTS OF ACCUSED—CONFLICT OF CONSTITUTIONAL AND STATUTORY PROVISIONS. Although the rules of practice in civil cases, in the absence of a special statute, are made the rule of practice in criminal cases, such statutory rules cannot be given effect where their operation would contravene the constitutional guaranty for the protection of a defendant, on trial in a criminal case, that he shall not be compelled to be a witness against himself.

SAME—SELF-INCRIMINATION—WAIVER. Where the state has placed the accused under the imputation of guilt by demanding on the trial that he produce certain documents, the defendant does not waive objection to the violation of his constitutional guaranty against being compelled to be a witness against himself by subsequently taking the stand in his own behalf and testifying as to the matters inquired into; since placing him under the imputation of guilt forces him to take the stand and he is not a voluntary witness.

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. It is misconduct constituting a comment on the evidence, within the prohibition of Const., art. 4, § 16, for a judge, in a criminal action, to so examine a witness essential to the defense as to suggest a doubt as to the integrity of the witness.

SAME—APPEAL—EXCEPTIONS—COMMENT ON EVIDENCE. The action of the court in commenting on the facts in a criminal case, by so questioning a witness as to convey to a jury doubt as to her integrity, being an invasion of the constitutional rights of the accused prohibiting the judge from commenting on the facts, may be reviewed on appeal although no exceptions were interposed at the time; such conduct constituting neither a "ruling" or "decision," within Rem. & Bal. Code, § 381, requiring exceptions.

¹Reported in 145 Pac. 470.

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WITNESSES—IMPEACHMENT—REPUTATION OF WITNESS—IMMORALITY. For the purpose of impeaching a female witness for the state, it is error to refuse to allow the defendant to prove her general reputation for morality in the neighborhood in which she lives.

Appeal from a judgment of the superior court for Pacific county, Wright, J., entered November 11, 1913, upon a trial and conviction of conspiracy to obstruct justice. Reversed.

John T. Welsh, M. M. Richardson, and Robert G. Chambers, for appellants.

H. W. B. Hewen, for respondent.

CHADWICK, J.—Appellants were convicted of the crime of conspiracy to pervert and corrupt public justice and the due administration of law, in the superior court of Pacific county, Washington, in a case there pending entitled *J. W. Coleman and Belle Coleman v. The City of Raymond*. They have brought their case here, making twenty-one assignments of error. We will not discuss assignments which in our judgment have no merit, or which will not likely recur upon a new trial, or those which we regard as without prejudice.

It is one of the contentions of the state that the defendants, acting in conspiracy, had paid money to suborn the testimony of certain witnesses. The city of Raymond had drawn a warrant which had been forwarded to one of the defendants at Portland, Oregon, where it is alleged the witnesses were corrupted. The state also contended that a witness had been induced to make a certain statement in writing and that the statement tended to prove the crime charged. Prior to the trial, the prosecuting attorney made a demand upon the defendants to produce the draft and statement. They were not produced. A witness was called to give secondary evidence as to the contents of the bank draft, and the witness, who it is alleged signed the statement, was called for a like purpose. The prosecuting attorney, in the presence of the court and jury and over the objections of counsel,

renewed his demand for the production of the documents. This in our judgment constitutes reversible error.

"To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the Constitution of the United States, providing that no person in any criminal case shall be compelled to be a witness against himself." *McKnight v. United States*, 115 Fed. 972.

The reasoning to sustain this principle lies in this: That the state is not put to the necessity, neither will it be permitted to put an inference of guilt which necessarily flows from an imputation that the accused person has suppressed or is withholding evidence, when the constitution provides that no person shall be compelled to give evidence against himself. Not being bound to produce evidence against himself, the demand is futile and can serve no purpose, except to put defendant in a false light before the jury and compel him to defend himself against the inferences arising from a collateral circumstance and to the stress of extricating himself from a position in which the constitution says he shall not be placed. The state, under the ordinary rules of evidence, could have examined either one of the witnesses as fully and as completely as it desired without demanding the documents.

In *Gillespie v. State*, 5 Okl. Cr. 546, 115 Pac. 620, it is said:

"When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminate himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the constitution would be violated and trampled upon."

See, also, *McKnight v. United States*, 122 Fed. 926; *State v. Merkley*, 74 Iowa 695, 39 N. W. 111; *Ellis v. State*, 8 Okl.

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Cr. 522, 128 Pac. 1095; *Hibbard v. United States*, 172 Fed. 66.

While the question has never come to this court in just the same way, the principle is recognized in the case of *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 933, where a reversal was predicated upon a record showing that the court had compelled a defendant, who was a witness on his own behalf and over his objection, to testify that certain letters and documents had been written by him, and in *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382, where it was held that the right of the state to introduce secondary evidence did not depend upon a notice to produce documents possessed by a defendant and which were believed to be incriminating, for the reason that it was beyond the power of the court to enforce the demand. The court followed *McGinnis v. State*, 24 Ind. 500:

"It is difficult to perceive what benefit could result, either to the state or the defendant, from giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury, upon his refusal to procure it after notice."

But it is contended by the prosecuting attorney that the rules of practice in civil cases, in the absence of a special statute (Rem. & Bal. Code, §§ 2137, 2152, 2158 [P. C. 135 §§ 1165, 1153, 1185]), are made the rule of practice in criminal cases. Admitting that, in a proper case, this contention would be well founded, it is sufficient answer to say that no statutory rule of practice, whether in a civil or criminal case, would interfere to bar a defendant of the protection of § 9, art. 1, of our Bill of Rights and of the fifth amendment to the constitution of the United States.

The prosecuting attorney earnestly and sincerely challenges the rule in the case of *McKnight*. He cites many cases holding that it is not error for the prosecuting attorney to comment upon the fact that a defendant has failed to produce evidence that was within his possession and under his

control. Our answer to these cases and his argument is that this court, in the cases of *O'Hara* and *McCauley* has adopted a different rule, and that they are, in our judgment, hostile to the fourth amendment of the constitution of the United States, and possibly to the constitutions of the states where they were pronounced. The prosecuting attorney also relies upon the criticism of Mr. Wigmore, who, in his work on Evidence, vol. 3 (1904 ed.), p. 3149, § 2273, note 3, says:

"*McKnight v. United States*, 115 Fed. 972 [is unique] after evidence that an incriminating document is in the accused's possession, no notice of production can be given by the prosecution, because the claiming of the privilege would permit inferences to be drawn against him; the ruling is made on the assumption that a copy could be used under such circumstances without notice to produce,—an incorrect assumption, as shown *ante* §§ 1202, 1205, 1207; it also involves the fallacy that the mere necessity of making a claim of privilege for documents is improper because of the possible resulting inference,—a fallacy which reasons in a circle, because the privilege cannot be enforced until it is claimed and the court cannot both enforce it and forbid the necessary condition precedent to enforcing it; the ruling also involves the fallacy that the accused's failure, on notice, to produce the document was equivalent to a claim of privilege, but it was not, because it might have been done in precisely the same way if a non-criminating document and would merely have served as a basis for the use of a copy by the prosecution; these three fallacies so subtly combined in this ruling that the result is a plausible one; but the ruling remains purely fallacious and wholly unsound."

If we were treating the question in the abstract, it might, with some plausibility, be contended that we were reasoning in a circle, but reasoning cannot be rejected as meeting itself at the other side of a circle, when at the point of meeting it comes counter to a constitutional provision which says that a thing shall not be done. This means, shall not be done directly or by the pursuit of indirect methods. Furthermore, the reasoning of the learned text writer is faulty in this:

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the constitutional privilege of the defendant is known to the prosecuting attorney, and to demand a paper alleged to be incriminating, a jury being present, can bear but one construction, and that is a purpose to cast a reflection of guilt.

We reject the authorities cited by the state for the further reason that, under our statute and under the fundamental principles of the law as we understand them to be, the state could have proved all that it hoped to prove without a demand either before or at the trial. The state contends, also, that, granting all this to be so, it was error without prejudice because the defendants took the stand in their own behalf and testified as to the matters inquired into. The principle that one who voluntarily offers himself as a witness cannot invoke that provision of the constitution which guarantees that no person shall be compelled in any case to give evidence against himself, is relied on. *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. 888; *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800.

These cases do not apply to the case at bar. It cannot be said that a witness who has been put under the imputation of guilt (Chamberlayne, *Modern Law of Evidence*, 1080) in defiance of the constitution of the state and who offers himself as a witness to explain so far as he can the testimony which in law he has been forced to give against himself by inferential and indirect methods, is a voluntary witness. The fact that a witness may be compelled to answer to the jury for something that could not be introduced directly, is in itself enough to sustain the protective clauses of the constitution. If it were not so, the state, having no right to call for the testimony, could, by putting the imputation of guilt which follows an insinuated suppression of evidence upon a defendant, force an issue where there was none and where none could have been raised directly. We are satisfied that the substantial and constitutional rights of the defendants were violated by the proceedings complained of.

Mrs. Marguerite Jackson was called as a witness. Mrs. Jackson is not related to the appellant Jackson. She is a professional stenographer and was apparently a disinterested witness. She had been employed at Portland, Oregon, by the defendant Welsh to prepare certain interrogatories to be put to the principal witness, Maggie Rose. She testified, as did two other witnesses, that she wrote out the interrogatories and the answers thereto, on April 15, and that they were sworn to by Mrs. Rose on that day. Mrs. Rose at the trial testified that she had not signed interrogatories and answers in the office of the attorney where they are said to have been written, prior to the 25th day of April, 1918, when she gave a deposition in the case, which was favorable to the defendants. Her testimony is to the effect that the appellants, prior to the 25th of April, met her at a hotel in the city of Portland; that they had questions and answers written out; that she was schooled as to the testimony she was to give, and that a copy of the questions and answers were given her so that she might perfect herself as a witness in behalf of the city in the case of *Coleman v. Raymond*.

We think it will hardly be contended that a conviction could have been had in this case without the testimony of Mrs. Rose. She swore that she had been paid money by defendant Jackson. During the progress of the examination of Mrs. Jackson, and while she was under cross-examination by the prosecuting attorney, and while the paper which Mrs. Rose says had been handed to her by Welsh for the purpose of rehearsing her testimony was a subject of inquiry, the court of its own motion interrupted and cross-examined the witness as follows:

"The Court: *Where did this paper come from, part of the stock in the office of McCue?* A. Yes, I used some of their stationery. The Court: *You say you have your note book here. Will you let me see it?* A. Yes, sir. The Court: *Turn to the notes of this particular proceeding. You just took a book over there?* A. Yes, sir. The Court: *No date on it?* A. No. (The Court examines note book.) The Court: *How*

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many pages does that cover? A. I think it covers three pages of typewriting. The Court: *Your notes I mean?* A. *Nine pages.* The Court: *You have no dates in this book at all?* A. No, I haven't. The Court: *What system of shorthand do you use?* A. Howard Pitman. Q. *Would you like to leave on the afternoon train—do you need this book particularly?* A. Yes, I have notes in there. I don't know as there is anything on the back of those notes that I wish to save. The Court: *You retain it so we can get it?* . . . Mr. Hewen: When you commenced to use the book did you commence at this front portion? A. I did. Q. Why was it then that on the very first sheet of this book the case of J. W. Coleman and Belle Coleman against the City of Raymond is titled? A. I took the interrogatories that were dictated to me by Mr. Welsh to be propounded to the witness on the 26th. Q. That was on the 15th? A. Yes, that was on the 15th. Q. But here these interrogatories about which you have testified that were propounded to her on the 15th occur nine or ten pages, or a number of pages, further over in the book; why is that? . . . Those interrogatories were dictated so they could be propounded on the 26th. The Court: The first page shows the title of the case and then that is followed by what—the interrogatories to be given on the 26th? A. Yes, sir. Q. And that is followed by what? A. By her statement she made. Q. And that dictation was taken as I understand you during the half hour preceding the arrival of Mrs. Rose? The Court: *That seems to be in consecutive order.* Mr. Hewen: Q. Will you turn to the first page of your book and read the interrogatories there contained of which you have just testified? Mr. Welsh: Which interrogatories? Mr. Hewen: The first ones.

"The Court: The ones to be used on the 26th. (The witness here reads questions and answers from her note book.) Witness reading. A. What is your name and where do you reside? Q. Next? Q. Where were you residing on or about the first day of October, 1912? Q. Yes? A. Are you acquainted with J. W. Coleman, the plaintiff in the above entitled action, and if so for how long have you known him? Q. Yes? Q. Did you see said J. W. Coleman on the night of the first of October, 1912, or the morning of the second of October, 1912, and if so state when and where and what was

he doing and did you have any conversation with him at that time and if so what was it?

“(Examination resumed.)

“Mr. Hewen: Q. Let me ask you a further question. If those were the interrogatories to be propounded on the 26th that were dictated to you by Martin Welsh, did Mr. Welsh at that time make any explanation when Mrs. Rose a few minutes afterwards came in and those other questions were propounded, why he didn't propound those questions to her? A. No, he wouldn't make any explanation like that to me. Q. He made no explanation? A. No. Q. But went forward and propounded an entirely different set of interrogatories? A. He never used any paper at all in asking his questions. Q. He didn't ask you to read these off? A. He didn't. I was not a notary.”

We have italicized that part of the examination, or rather cross-examination, by the court which in our judgment is objectionable and sufficient, when taken in connection with other facts and circumstances in the case, especially the great importance, if not the absolute essentiality of the testimony of the witness Maggie Rose, to sustain the contention that the conduct of the trial judge was prejudicial to the rights of appellants. No inference can be drawn from the record other than that the court entertained some doubt as to the credibility of the testimony given by the witness. We think the conduct of the court was clearly a comment upon the evidence and violative of the rights of the appellants under art. 4, § 16, of the constitution. His comment that there was no date on the book, and his inquiry as to where the paper upon which the interrogatories and answers were written had been obtained indicated a doubt as to the integrity of the witness. It at least insinuated the possibility that her statement might be inquired into upon an independent investigation. His remark that the notes seemed to be in consecutive order, stands out as the marking of a circumstance to be considered as against the insinuated doubt. His inquiry as to the system of shorthand used by her likewise indicated a be-

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lief on the part of the court that her testimony might bear further investigation, and that he intended to refer the notes to some one who was familiar with the Howard Pitman system of shorthand. This conclusion seems inevitable when the court had the witness read some of the interrogatories from her book so that he might compare them with the written interrogatories and answers, and the final request of the court that the witness leave her note book, and a final charge to her that she retain it so that "we can get it."

The prosecuting attorney does not seriously combat this contention of the appellants, but it is insisted that no exceptions were taken to the conduct of the court. An exception "is a claim of error in a ruling or decision of the court, judge or tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein." Rem. & Bal. Code, § 381 (P. C. 81 § 669). The conduct of the court cannot be called either a ruling or a decision, but it is nevertheless a part of the record upon which a claim of error may be predicated and sustained if actually or impliedly prejudicial. Indeed, such an act would ordinarily put a person accused of crime and who is attended by a presumption of innocence to great embarrassment, and make it more likely that prejudice would result if counsel engaged the court even to the extent of excepting to his remarks. Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other

hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

"It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness that nothing, in either the tone or inflection of the voice, the play of the features, the manner of propounding or framing the question, or the course of investigation pursued in the examination will indicate to the jury the trend of mind of the questioner. An extended examination of a witness by the court must be unfair unless it partakes partly of the nature of a cross-examination, and though great skill and tact and perfect fairness be employed, there is much danger the impression or opinion of the court as to the truthfulness, candor and reliability of the witness and as to the weight and value of his testimony will be manifested to the jury. Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness, or facilitate the progress of a trial without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable." *Dunn v. People*, 172 Ill. 582, 50 N. E. 137.

"In a criminal case the action of the trial judge in subjecting the witnesses of defendant to a rigid and extended examination on the vital points of the defense, or in catechising them at length as to their knowledge of the facts as to which they have testified, has a tendency to discredit them and is prejudicial error requiring a new trial in case of conviction." 40 Cyc. 2440.

While counsel cites many cases to the effect that an exception must be taken before alleged misconduct of the court can be taken notice of on appeal, the authority is not apt or pertinent. As said in the case of *State v. Crotts*, 22 Wash. 245,

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60 Pac. 403, our constitution, in so far as it declares that a judge should not comment upon the facts, is unlike the constitution of other states.

"There is no other constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours."

The principle relied on has been decided by this court in the case just cited. It was urged that misconduct of the court in questioning the witness could not be taken advantage of in this court because no exceptions had been taken. Judge Dunbar, whose keen sense of fairness and justice was never doubted by any man, wrote the opinion, saying:

"It is urged by the respondent that, as no exceptions were taken by the defendant to the questions propounded by the judge at the time they were propounded, under the general rule, and under the rulings of this court, no basis for a determination of those questions in this court has been laid. It is true that the ordinary rule is in consonance with the ruling, frequently announced by this court, that alleged errors will not be reviewed without they are excepted to at the time they are committed; but we do not think the error alleged in this instance falls within the rule, nor that the rule should be enforced when its observance would tend to destroy the very object for which the objection is ordinarily made. An attorney is placed in a delicate position under such circumstances. It is dangerous for him to enter into a controversy with the court in relation to matters and proceedings which the court itself is instituting. The court should not place counsel in this position without it becomes absolutely necessary for the furtherance of justice. In this case the defendant's counsel had to choose between the probability, or at least the possibility, of prejudicing his case in the minds of the jury by reason of his expressed opposition to the course pursued by the court, or else lose the benefit of an objection which he was entitled to make. We do not think counsel should be compelled to imperil their cause in the lower court for the purpose of protecting their rights in the appellate court. . . .

"There are different ways by which a judge may comment upon the testimony, within the meaning of the constitution re-

ferred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues."

See, also, *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131.

Appellants undertook to prove the general reputation of the witness Maggie Rose, for morality in the neighborhood in which she lived. The court sustained an objection to this form of proof. Maggie Rose, as we have said, was the principal witness for the state, and without her testimony it is not likely that a conviction could have been had. The testimony was competent under the authority of *State v. Coella*, 3 Wash. 99, 28 Pac. 28. The rule as stated by Underhill in his work on Criminal Evidence (2d ed.), § 237, is as follows:

"Impeachment by showing the general bad character of the witness aside from truthfulness. A few authorities reject all evidence to prove the good or bad character of a witness, except so far as it is confined to his reputation for truthfulness, or the reverse. If the witness possessed no knowledge of that particular trait of character, he is incompetent. *But the majority of cases allow greater latitude. In most cases, evidence involving the whole moral character of the witness will be received upon the reasonable theory that a man who is addicted to vicious habits, or who is prone to commit immoral acts, may be presumed to have lost respect for truth and to be ready to perjure himself when it is to his interest to do so.*"

The prosecuting attorney seeks to distinguish the *Coella* case. He says that the witness was there asked upon cross-examination "if she were not a prostitute," and there is a greater latitude allowed in cross-examination than when offering independent proof. We nevertheless believe that the

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reputation of a witness for immorality may be inquired into, either upon cross-examination or by a resort to general reputation. It is not the manner of proof that concerns the law so much as the object sought to be attained, for, as said by this court in the *Coella* case, a woman cannot ruthlessly destroy that quality upon which most other good qualities are dependent and for which, above all others, a woman is revered and respected, and retain her reputation for truthfulness unsmirched. We can mark no distinction between receiving evidence as to the reputation of a witness for truth and veracity and receiving evidence of reputation as to moral character, when this court has said that a reputation for immorality is a thing to be considered when passing upon the credibility of a witness.

The state contends that the case of *State v. Poyner*, 57 Wash. 489, 107 Pac. 181, is not in point. In that case the question "Do you know the reputation for chastity in Cle Elum of Minnie Black?" was asked of a witness. Counsel say that the question was proper because of the nature of the crime charged, which was that the defendant associated and cohabited with a woman not his wife. On the contrary, it is evident that the purpose of the testimony was to create a reasonable ground for an inference that the woman, who was a witness upon the trial, was not a person of dependable veracity. If it were not so, then the question would have been irrelevant and immaterial to the issue, for the statute then in force made one so cohabiting guilty without reference to the character of the woman with whom he cohabited.

It is strenuously contended that, upon the whole case, there is not enough testimony to sustain a conviction. The case comes to us with a statement of facts and record comprising some two thousand pages. We cannot review the facts within reasonable compass. It is enough to say that, after an examination of the record, we are of the opinion that however weak the testimony may be as viewed by an appellate court, there is some evidence which would carry the case to a jury.

There are a number of assignments calling attention to incidents attending the trial but not going to the substantive facts or law of the case which, although not regarded by us as sufficiently prejudicial to warrant a reversal, should not occur on a retrial.

Reversed and remanded for a new trial.

Crow, C. J., MORRIS, GOSK, and PARKER, JJ., concur.

[No. 11202. *En Banc*. January 11, 1915.]

In the Matter of the Estate of SARAH J. BROWN.
GEORGE H. GODFREY *et al.*, *Appellants*, v. NELLIE
WATERHOUSE *et al.*, *Respondents*.¹

WILLS—CONTEST—FORGERY—EVIDENCE—SUFFICIENCY. In a contest of a will on the ground of forgery of the testatrix's signature, evidence examined and found to sustain the finding of the lower court in favor of the validity of the will (CHADWICK and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 19, 1912, upon findings in favor of the defendants, in a will contest, tried to the court. Affirmed.

Scott & Campbell, for appellants.

Ira Honefenger and *Hamblen & Gilbert*, for respondents.

MAIN, J.—This action was instituted for the purpose of contesting the will of Sarah J. Brown, deceased. After the issues had been framed, the cause was tried before the court sitting without a jury. Findings of fact and conclusions of law were made, and a judgment entered sustaining the validity of the will. From this judgment, an appeal is prosecuted.

The will purports to have been executed on the 14th day of January, 1910. On January 16, 1911, Sarah J. Brown,

¹Reported in 145 Pac. 591.

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the testatrix, died. The will was found and produced on or about the 15th day of December, 1911. Subsequent to the death of Mrs. Brown, and prior to the date of the finding of the will, the estate was being administered upon. After the will was found and produced, it was admitted to probate on January 28, 1912. Thereafter, and on January 30, 1912, the present action was instituted.

The will, after making certain specific bequests and devises, gives the residue of the property to two adopted sons, and the nieces and nephews of the testatrix, share and share alike. The two adopted sons, who by their guardian *ad litem* are the contestants in this proceeding, were adopted during the year 1902, when they were 5 and 6 years old, respectively. They were sons of Mrs. Brown's brother, Clarence B. Godfrey and his wife. After their adoption they continued to reside with their parents as before.

The statement of facts in this case covers a little more than 650 pages. Also there are many exhibits. Most of these, however, are documents containing the admitted signatures of Mrs. Brown, offered in evidence for the purpose of comparison with the signature upon the will. There is no question in the case other than one of fact. In none of the briefs is there a single law book cited. The ultimate question is, whether the signature upon the will is that of Mrs. Brown. The testimony, not only upon this primary question, but upon the collateral questions, is in conflict. Every page of the statement of facts has been carefully read and the exhibits have all been examined. The signature upon the will has been compared with the admitted signatures, under a hand-glass, and also under a microscope. Taking into consideration all the evidence in the case, we are of the opinion that there is not only insufficient evidence to justify the reversal of the trial court upon a finding of fact, but that the evidence affirmatively shows that the judgment of the trial court was right. To enter upon a review and discussion of the evidence

would unduly extend this opinion, and would serve no useful purpose. Where the question is solely one of fact, the opinion is not valuable as a precedent.

The judgment will be affirmed.

CROW, C. J., MOUNT, PARKER, MORRIS, and GOSE, JJ., concur.

ELLIS, J., took no part.

CHADWICK, J. (dissenting)—I dissent. This case was originally assigned to me. I believe I took it with an open mind. I have given it more care, more thought, and more study than any other case ever submitted to me for my judicial opinion. I took the case primarily to affirm. I could not put an affirmance on paper, nor do I believe that it would be possible to make a detailed statement of the case and draw the conclusion that the court has drawn. The only way to affirm the case is to pass it without argument, saying that, taking the case by its four corners, we find there is a conflict of evidence and the court is not prepared to say that the evidence preponderates against the decree of the lower court.

Judge Main has read the record with conscientious care and zeal, and he has drawn the conclusion that, upon the whole case, the decree should be affirmed. I, too, have read every page of the statement of facts, and reread the greater part of it. I, too, have examined the exhibits and put the disputed signatures under a reading glass and a high power microscope. I have done my work and shall avail myself of the privilege of giving reasons which, in my judgment, sustain my opinion that the purported will of Sarah J. Brown is a forgery.

Sarah J. Brown went to the city of Spokane about the year 1889. She engaged in dressmaking and made some investments in real estate which proved profitable, so that at the time of her death, which occurred on the 16th day of January, 1911, she had accumulated an estate which was appraised at about \$40,000. Mrs. Brown possessed an unusual

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aptitude for business, and was careful and methodical in all of her business habits. She had transacted her business through an attorney for more than twenty years. During that time, Mr. D. W. Henley, Messrs. Henley and Scott, and Mr. Scott, now of counsel for the contestants, did her legal business. She kept her valuable papers in a tin box which she deposited in her lawyer's vault. Judge Prather, an attorney of respected standing, had done some little business for Mrs. Brown many years ago. He has an indistinct recollection of drawing a will, but no showing is made that would warrant us in holding that Mrs. Brown, during the twenty years of her active life in Spokane, ever consulted, except in the most remote instances, any lawyer other than Mr. Henley or Mr. Scott for guidance or advice. In the years 1891-1893, Mrs. Brown acted as administratrix of the estate of Benjamin F. Whipple, deceased. This is noted for two reasons: To show that Mrs. Brown was familiar with the ways of the law and of law offices, and because many of her signatures have been gathered from the files of that case and have been offered as evidence in this one.

Clarence B. Godfrey, a brother of Mrs. Brown, and his wife, Etta B. Godfrey, have two sons, George H. Godfrey and Frank B. Godfrey. Mrs. Brown seems to have had an affection for these children, and in October, 1902, at a time when they were five and six years old respectively, she adopted them as her own, with the consent of their parents. She attended to and met the expense of their schooling. When not in boarding school, the boys remained with their parents. It seems to be proven beyond the peradventure of a doubt that the only object Mrs. Brown had in adopting the boys was to see to it that they had proper instruction and to make them her lawful heirs. Her relationship to the boys was not changed during her lifetime, and they were her legally adopted children at the time of her death. Mrs. Brown was of the age of about sixty-four or sixty-five years at the time

of her death. She had ever been of sound mind and alert to her business interests.

After the death of Mrs. Brown, search was made for a will. None was found in her tin box, where inquiry was first and most naturally directed, nor was any found at her home. Mrs. Etta B. Godfrey, the natural mother of the adopted sons of Mrs. Brown, was appointed administratrix, and proceeded to administer the estate until the purported will was admitted to probate. A contest was thereafter instituted by the natural father of the adopted sons, who are also parties contestant, and by their guardian *ad litem*. The trial judge found that contestants had failed to sustain their petition, and decreed the proposed will to be the last will and testament of Sarah J. Brown, deceased. An appeal to this court is prosecuted.

Contestants assert the will to be a forgery because, first, the direct testimony shows that she had no will; second, concomitant circumstances show the proffered document to be false; and third, the paper (a) shows forgery upon its face, and (b), by a preponderance of the credible testimony of the opinion witnesses and of the experts in handwriting, it is shown to be such.

Mrs. Nellie Waterhouse and Mrs. May Pixlee are daughters of Lucinda L. McFarlane, a sister of Mrs. Brown. Mrs. McFarlane died about two months before Mrs. Brown passed away. Certain real property which Mrs. Waterhouse claimed as her own, but for which Mrs. Brown had probably furnished the whole consideration, was in Mrs. Brown's name when she died. She also held the note of Mrs. Pixlee for about \$800. A brother of these women, George L. McFarlane, also owed a note to the estate. Mrs. Waterhouse and Mrs. Pixlee expected that Mrs. Brown would devise the property and absolve the note in her will. It seems fairly certain from the testimony that Mrs. Waterhouse and Mrs. Pixlee were bitterly and even angrily disappointed because their aunt had not released their obligations and had not distributed her

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property, especially some diamonds, by will, in the way they thought she should have done. They seem to have entertained the idea that if the adoption of the boys were set aside they would obtain an advantage over the other heirs, and they talked with Mrs. Godfrey, and a lawyer was consulted with reference to vacating the order of adoption. The testimony is very conflicting upon this item as to which one of the parties was the mover. Mrs. Waterhouse and Mrs. Pixlee say that Mrs. Godfrey suggested it. She denies it and insists that the other women suggested it. But it is certain that the matter was discussed and that Mrs. Waterhouse and Mrs. Pixlee were extremely anxious that it be done. The Godfreys were not unwilling that Mrs. Waterhouse should have the property claimed by her, and a friendly suit was begun by Mrs. Waterhouse against the administrator, and a decree so holding was entered. There seems to be no doubt of the fact that Mrs. Brown had often said that she intended that "Nellie" should have the property, and it seems to be about as certain that she held the property in her own name in order to protect it from the consequences of habits less thrifty than she knew herself to possess. Mrs. Pixlee was insistent that she should be given her note without payment. She made at least one, and possibly more, trips from her home at Ephrata with the avowed purpose of demanding the note. A final demand was made on the administratrix about December 8, 1911.

At this time, Mrs. Pixlee suggested to Mrs. Godfrey, the administratrix, that it had been Mrs. Brown's intention to put the name of a deceased brother on Mrs. McFarlane's tombstone. Neither Mrs. Godfrey nor Mrs. Pixlee knew the date of his death, and Mrs. Pixlee assumed to look for it among her mother's old papers. About December 15, at the home of Mrs. Waterhouse, in the presence of Mrs. Olson, a neighbor, and Miss Jenkins, who say they were asked to "Come over" and hear some music on the phonograph (one of these witnesses also testifies to an anxiety on the part of the sis-

ters to have another lady present), Mrs. Waterhouse and Mrs. Pixlee brought out an old red wallet stuffed full of old papers belonging to their mother. The papers number one hundred and eleven and are wholly irrelevant to any issue in this case. The wallet was tied in an old newspaper stained with the mark of a coffee cup. Mrs. Waterhouse testified that, on the Saturday before Mrs. Brown's death, she took the old red wallet from Mrs. Brown's house, where Mrs. Brown had had it, for the purpose of looking through her deceased sister's papers; that the papers were scattered over a small center table and over Mrs. Brown's desk; that she gathered them up and wrapped them and the wallet in an old newspaper which Mrs. Brown had laid upon the small table upon which she was accustomed to eat her meals; that there was a stain of coffee upon it. Her theory is that, in gathering up this wallet and wrapping it in the newspaper, she picked up the envelope containing the will. Resuming now our narrative, Mrs. Pixlee started to look through the papers, and "all at once" she dropped them on the floor. In picking them up, she or Mrs. Waterhouse "happened," out of the whole number of papers, to pick up an envelope, blank with the exception of the words "my will" written dimly across one end in lead pencil. Mrs. Pixlee says she said, "Why, mother had a will." Mrs. Olson took it out of her hand and examined and read it. Miss Jenkins testifies to the discovery of the will as follows:

"State to the court what was said and what was done in the finding of this will? A. Mrs. Pixlee said that, looking at some old pictures of people back east put her in mind of an address that Mrs. Godfrey wanted to find in some old letters, and she spoke to Mrs. Waterhouse about looking those old letters over, and she said, 'Should I look them over tonight or should I take them home with me?' and I think Mrs. Waterhouse said do just as she was a mind to; and she said—Mrs. Pixlee said again to Mrs. Olson, she said, 'What would you do?' and Mrs. Olson said, 'Why,' she said, 'I would look part of them over and if I got tired I would take the rest of

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them home with me.' And so she was looking them over, and when she unwrapped them in this newspaper there was a mark where the cup had sat, a cup of tea or coffee had made a mark on the table cloth, and so I had my attention drawn to it; she said, 'This is one of Auntie's table cloths; you can see where the cup sat on it,' and I noticed it, and she drew Mrs. Olson's attention to it, and she noticed it, and I think then was when Mrs. Waterhouse said, 'I must burn those—them in the stove,' or something like that, she said, and she made a grab for them; she was sitting across the room, and she made a grab for them and knocked them out of Mrs. Pixlee's lap, and if I remembered right the first letter, the first envelope, Mrs. Pixlee picked up, it had across the end of it, 'My Will.' Mrs. Pixlee held it up, and she says, Mrs. Pixlee said, 'There is the lost will; auntie has made a will,' and she handed it to me, and I don't remember if I opened it or handed it back to her and she opened it, but I remember I was the first one to open the will inside the headings unfilled in and I opened it and I said, 'The last will and testimony of Sarah J. Brown,' and I just dropped it on the floor; I said, I don't want nothing to do with it;' and I think Mrs. Pixlee picked it up and said, 'Maybe no one ought to read it; we ought to take it to a lawyer' and Mrs. Olson says, 'Yes, we will read it; it won't do any hurt,' and she took it and started to read it and I think one of them grabbed it away from her, and she grabbed it back again and read it, and she read it aloud a couple of times so we all heard it."

The will was carried to the attorneys for Mrs. Waterhouse and was afterwards offered for probate.

One of the witnesses to the will, George A. Griffeth, had known Mrs. Brown for more than twenty years. He is a farmer living west of Spokane, and is the father-in-law of George McFarlane, one of the beneficiaries under the will. W. C. Lavender, the other witness, says that he did not know Mrs. Brown, although Griffeth says he (Lavender) had met her on at least one occasion at his home. Lavender does not remember the circumstance. Lavender was a friend of Griffeth of more than twenty years' standing. The two witnesses to the will substantially agree that they were met by Mrs.

Brown (although Lavender says that not knowing her, he does not swear that it was in fact Mrs. Brown) on Riverside avenue near McNabb's drug store, and were asked by her to step into the drug store and witness her will; that they went into the store and, in the northeast corner, at a place provided for the convenience of customers, the three of them signed the document. Lavender says it took "just a minute, just long enough to sign it up." This is a significant fact to which we will refer later. Lavender further testifies that he remembers the signer of the will as a woman between "forty and fifty," that she did not appear to be old, and that she acted like she was in good health. Griffeth also says that she seemed to be in good health, although there can be no question that at about that time (the most of the month of January) she was laid up with rheumatism and unable to walk. Lavender says he never saw the woman after that time.

Another incident relied upon by proponents is testified to by Judge Prather, who says, in substance, that sometime within the year or two then just past, some man whom he does not now remember, came to him and exhibited a typewritten draft of a will, and asked him whether it was in legal form. He replied that it was, whereupon, his visitor told him that he had been sent there by Judge Prather's old friend, Mrs. Sarah J. Brown, who thought that because of old friendship he would make no charge for his advice.

Testimony is also offered tending to show that Mrs. Brown had intended to square all debts and obligations owing by her nieces and nephew, but it is nowhere made to appear that she ever manifested, by word or deed, an intention to discharge their debts and at the same time make them residuary legatees of equal standing with her adopted sons. There is much testimony tending to show that Mrs. Brown had said that she had done all that she intended to do for her sister's children. On this feature of the case, the testimony neutralizes itself.

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Would a woman be apt to make a will under the circumstances, and act with reference to it as it is alleged Mrs. Brown did, in the light of the following facts? She was an accomplished business woman, "smart," of mature thought and careful business habits. She had been accustomed, both before and after the date of the alleged will, to do her business through her attorneys. The making of a will was no new thing to her,—it seems to be agreed by all that she had made a will some years before. It was a subject that was often discussed by her. There was no reason why she should go about it in a mysterious way, or work through the instrumentality of some man who appears on the scene and makes his exit from the stage without revealing his identity. To be called upon to act upon such a delicate mission, the party must have been an old friend of Mrs. Brown's and if so, he would probably have been known, either personally or by reputation, to Judge Prather. The record reveals no like instance where Mrs. Brown depended upon others to attend to her affairs. She was on sufficient terms of intimacy with her own lawyer to loan him money, and if the plea be urged that she sought to save a fee by sending the draft of her will to an attorney by the hand of a stranger for approval, it may be answered by saying it is more probable that her own attorney would have answered her question without fee than one who had gained no profit from her in a business way. Mrs. Brown was not close or stingy. The record shows the contrary. She was generous, rather than grasping. She had been very liberal with her sister's children. The contested will was undoubtedly drawn by a lawyer, or from a legal form, and it seems improbable, in the light of all the other circumstances attending the execution of the will, that Mrs. Brown, the methodical business woman, would have had it drawn by a lawyer other than her own. If she desired the advice of another lawyer, it is more likely that she would have gone to him herself. It would be utterly contrary to her habit and her life history in Spokane to charge her with

going to some lawyer who cannot now be found, and whose work she had not sufficient confidence to accept without further assurance, and then to resort to the unusual method of passing a matter of that magnitude through the hand of a third party to be assured of its validity.

Then, again, the case touches the doctrine of probabilities in this: considering Mrs. Brown's business training, she would in all probability have executed and obtained witnesses at the time and place where the will was drawn and there closed the transaction and put it away for safe keeping, for if we say it is her will, the form of it must have been satisfactory to her; there are no corrections or interlineations; although her sister is called "Lydia" instead of Lucinda, by which name she was known, and her nephew and nieces are named without the initials, which she ordinarily used. Instead of doing the usual, ordinary and natural thing, we find that she went out on the highways with intent to call witnesses from the bystanders, and just happened to meet Mr. Griffeth and his friend Lavender, and then went into a public drug store to execute the will at a desk, or place to write on the counter. The two witnesses are not at all clear which it was; but, whichever it was, it was not there, as is shown by several disinterested witnesses, employees in the drug store. It had been removed some months before the date of the purported will. The witnesses do not remember whether they or Mrs. Brown sat down or stood up to sign the document. A most striking circumstance is, that instead of then going to the repository where her private papers were kept, a place safe from intrusion and fire, and where those interested would naturally look for such a document at the time of her death, she left it around her home for nearly a year, so carelessly that it found its way into a pile of rubbish. The old pouch is full of Sunday school cards, rewards of merit, clippings, business cards, advertisements, letters, etc., unimportant and inconsequential things such as youth gathers and sentiment

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retains with growing strength as age creeps on. Mrs. Waterhouse says her mother never destroyed anything.

The finding of the will under circumstances that were so unusual as to call for some explanation, puts suspicion upon it. The women who happened in or were called in, both agree that Mrs. Waterhouse and Mrs. Pixlee were urgent in their request that they tell the lawyers that they were not invited to be at Mrs. Waterhouse's at the time the will was found. One of them says that she was told that she would receive \$100 if they won the case and established the will. All of these things, and others which might be mentioned, when coupled with the fact that Mrs. Brown had been generous with Mrs. Waterhouse and Mrs. Pixlee and George McFarlane, the children of her deceased sister; the fact that she adopted her brother's boys to make them her heirs, as is testified by many disinterested witnesses; the fact that she had had a will before the adoption, and thereafter and up to the time of her death had said frequently to many third parties who have no interest in the case, as well as her own attorney as late as November, 1910, that while she had had a will, she had destroyed it, fearing that a will might be broken; the fact that, during her last sickness, when asked by the doctor, at the solicitation of Mrs. Waterhouse or the Godfreys (they are not agreed as to who suggested it), about her affairs and whether she had a will, she expressed her impatience and displeasure, saying she could attend to her own affairs; the fact that the greater number of the witnesses agree that Mrs. Brown was confined to her home about the time the will was executed, unable to walk about the house or to the toilet because of a swollen foot and rheumatism, and that it is improbable that she was able to be on Riverside avenue in apparent good health on the 14th day of January, brings me to a consideration of the signature of the will.

Having detailed the facts in a general way, and keeping in mind the interest of the proponents who discovered the will, I come to a consideration of the signature and date line of

the will, resolved to weigh the testimony with unusual care and as independently of the circumstances just recited as I can, although probabilities and incredibilities must of necessity enter more or less actively into the consideration of the questioned signature.

The law of questioned documents, if it may be called a settled branch of the law, is an interesting subject. There may be signatures which will pass the scrutiny of a careful eye, yet under the microscope or when superimposed upon or juxtaposed with an authenticated signature, the most careless observer will admit to be bald, even clumsy forgeries. Where, after the usual tests of observance and microscopical examinations, the witnesses are of different mind, a judge to whom the issue is submitted must resort to his own judgment, and from the conflict of opinion, the maze of circumstance, and a comparison of the questioned signature with all the authenticated ones, endeavor to extract the truth. To accomplish this, we, like the experts who have disagreed, must go over the same ground, employ the same tests, and by processes of inclusion and exclusion, come to some opinion. Our field broadens, for unlike many of the witnesses who hold an authenticated signature in one hand and the questioned document in the other and, by mere comparison or reference to pictorial effect, express an opinion, we are compelled to consider the disposition, the character and characteristics, the motives and purposes, the health, the very life history of the one whose writing is offered even to its minutest detail; to measure probabilities, and, finally, if there be a probability one way or the other, to consider it in the light of the opinions. We must measure the witnesses, their experience, their interest, their attitudes, their apparent candor or lack of candor, their ability to judge, their opportunities to know the signature offered, their mental characteristics, the extent of their examinations and comparisons. It is our duty to observe to what extent an opinion upon scientific subjects or questioned hypotheses may be influenced by that bias and

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partisanship which in many, if not in most all such cases, influences, possibly in an unconscious way, the opinions of those who testify or may have testified in pride of opinion or in consideration of an unusual fee. We must give weight to the experts in proportion as we think the reasons given for their opinions are good reasons or bad reasons. Osborn, *Questioned Documents*, 258.

Waiving for the time the opinions of the experts and others, and approaching the question, as I believe, with an open mind and with a sincere purpose to try the case *de novo* (*Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970), I first submit an enlarged copy of the questioned signature and the attendant writing "Jan. 14th."

(2) The questioned signature and twenty-eight signatures taken haphazard from checks written in the years 1909-1910.

(3) Three signatures written in 1891-1893. These were taken from the public files in the county court house in the case of Whipple, deceased, and are presented to illustrate two points which I shall presently make.

(4) A memorandum written by Mrs. Brown. This is offered to illustrate figures 1 and 4 and the figures 1 and 9.

(5) A letter showing the several characteristics of Mrs. Brown's handwriting. It is written on paper of about the same weight and texture as the paper upon which the questioned signature is found, and is valuable as a basis for comparison. Attention is called to the dots and punctuation marks, and the figures in the date line.

(6) A note made Dec. 5, 1910, showing general characteristics and the signature of Mrs. Brown.

(7) A check, the last one drawn before the date of the will, also a check drawn Aug. 13, 1909, showing ragged and heavy letters. The heaviness of the letters and figures in this check, apparently due to bad ink or pen, is submitted for comparison with the laying on or retouching of the letters in the questioned document.

14th day of Jan.

I.

Sarah J. Brown

Testatrix.

[illegible]

III.

day of May 1891
Sarah J. Brown
Adm
 Allowed and approved for
 \$11.25 this 18
 day of July 1891

Sarah J. Brown

Sarah J. Brown
 Allowed as above.
 Wm and S. Horton Sec.

IV.

quit claim
 Lots 21, 22, 23, 24 Blk 3
 5, 6, 13, 14, B. 4
 Warranty Deed
 Lots 1, 2, 3, 4, 8, 9, 10, 15, 16, 17, 13 4
 To Scott L 23, 24, B. 4
 O Barton = 19 B. 4
 M Pixlee = 1, 2, 3 B. 3
 S McFarlane = 13, 14, 15 B. 3
 Brandt = 7, 8. B 5
 sold to 18 Lots
 last lots put claimed
 to 18-22 3 4
 To Hubert Barton
 Lots 11 and 12, B 4
 sold

Spokane June 25, 1910

Dear Cousin

yours recd I was away from home so just got it. now my Dear if you want to come out here, and live with me I will give you and Baby a home and clothe you both and will send you a through ticket, and it won't cost you any thing, will pay your expences back if you want to go any time. if you get homesick I don't think but you will like it - I keep House by myself may have my Sister with me

VI.

20
 31 Spokane Dec 5th 1910
 Three months after date without
 grace I promise to pay to
 Otto Passy the sum of seventy
 five dollars with interest at
 the rate of eight percent per annum
 until paid for value received
 Case 6482 Sarah J Brown
 Agent, E. J.

VII.



31 SPOKANE, WASH. Dec 31. 1907 No. 45

EXCHANGE NATIONAL BANK
 SPOKANE, WASH.

PAY TO Sarah J. Brown OR ORDER \$188⁰²
 One Hundred Eighty eight ⁰²/₁₀₀ DOLLARS
 Sarah J. Brown



93 SPOKANE, WASH. Aug 3rd 1907 No. 35

EXCHANGE NATIONAL BANK
 SPOKANE, WASH.

PAY TO G. B. Farington OR ORDER \$57⁶³₁₀₀
 Fifty Seven and ⁶³/₁₀₀ DOLLARS
 Sarah J. Brown

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From these documents, selected at random from the scores I have examined, I think it may be fairly set down that Mrs. Brown betrayed certain fixed characteristics.

(1) She wrote an angular hand. The principal experts for contestants say that the questioned signature was made by one who used the muscular movement. The principal expert witness for the proponents says that it is a combined muscular and finger movement. Both are right. The signature is a combination of the two, but is made by one who used the muscular movement. I find nothing in the writings of Mrs. Brown that even suggests that she ever wrote a free, full muscular hand, or a combination of the muscular and finger movement. Mr. Fearon, an important expert witness for the proponents, says Mrs. Brown's writing was wholly finger movement.

(2) She wrote a nervous hand. Her hand was at times "shaky." The letters "a-r-a" in the disputed signature betray neither of the two characteristics mentioned. They are full fashioned, with perfect curves, and in themselves betray a familiarity with the Spencerian copy book hand of a generation ago.

(3) In writing her signature, Mrs. Brown stuck to *the* line or to *a* line, as writers using a finger movement almost invariably do. In the few instances in which we find either "Sarah" or "Brown" above the line, the name is on the line or a line. We find no signature describing the sweep of a circle from the letter "S" to the letter "n" as does the proffered signature. With her cramped finger movement, she could not have made such a sweep.

(4) Mrs. Brown made the letter "J" with two strokes of the pen. This is admitted by both principal experts. Her hand was not taken from the paper on either stroke. In the questioned document the "J" in "Jan." shows in the enlarged photograph, and under the microscope at least four primal movements and as many, if not more, patches. In the initial "J" there are at least three primal movements. The upper

part of the true J's is narrow. The disputed J's are round or oval rather than long and sharp. They are neither characteristic, nor are they sustained by reference to any of the examples set before us.

(5) Mrs. Brown rarely closed the first "a" with the up and down stroke. She habitually left the second "a" open with a loop at the top of the first stroke. In the few instances where she closed the second "a" the first up and down strokes are made with the same loop movement and not as it is in the questioned signature.

(6) The letter "r" is characteristic. I ask a comparison of the r's in the questioned signature and in the admitted signatures shown on plate 2. The "r" in Sarah does not compare with any "r" in any of the writings. The "r" in Brown is more characteristic, but when examined under a powerful microscope, it so clearly shows a careful reconstruction that it is worthless as a basis of comparison.

(7) It was the habit of Mrs. Brown to close the "o" in Brown. Whether she did, or did not, do so, the first stroke of the "o" is habitually made with a loop or a loop movement. The "o" in the questioned signature is not characteristic. I submit a comparison of it with the "o's" to be found in other writings and pass it as needing no further reference.

(8) The first upstroke of the capital "S" describes an arc, whereas, this movement in Mrs. Brown's signatures more nearly approaches a straight line. The loop is wider and does not resemble any made by her.

(9) Mrs. Brown carried the last stroke of the "w" in Brown, this she made like "u," or the first stroke of "n," as it may be, upward, and inclined to perpendicular. In the questioned document, it is inclined to the horizontal so radically that it distinguishes the line from any that has been submitted for our inspection. The run from the "w" to the "n" is markedly greater than in any of the other signatures, and greater than one would expect to find in the handwriting of one who is writing with a finger movement.

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(10) She made the last stroke of her "a's" with a down or perpendicular stroke, a finger movement. This is found in every "a" I have examined. The "a" in "Jan." lacks this characteristic. Not only does it not return to the line, but goes on to the first movement in the latter "n" by a horizontal stroke. Compare this "a" with the full fashioned perfect "a's" in the disputed Sarah and with the "a's" in the admitted signatures. If the several "a's" were written by the same person, it seems unlikely that they were written at the same time and under the same conditions, as testified by the witnesses to the will.

(11) The upstroke and the last movement in the letter "n" in "Jan." are clearly round and curved and were written by one having a muscular movement.

(12) Mrs. Brown habitually made the horizontal stroke in the figure four with an upstroke or movement, and when she used it at all, which was not frequent, as habitually made the horizontal dash under the abbreviation "th" or "nd" with a downstroke. I cite the violation of these characteristics in the figure fourteen. Mrs. Brown made the perpendicular lines in 1 and 4 nearly straight up and down. In the questioned document they are less perpendicular than in any we have in the exhibits, and they show the easy, finished line of a Spencerian muscular movement.

Mr. Lavay, in his little work on disputed handwriting, says:

"The little things are the ones that count most in making examinations and determining a forgery for the reason that they are no less characteristic than the more prominent peculiarities and are more likely to be overlooked by the person who tries to disguise his hand. The crossing of t's and the dotting of i's become matters of large moment in making comparisons of disputed handwritings. There is probably no matter in conjunction with a man's ordinary writing to which he gives less thought than the way he makes these crosses and dots. For that reason they are in the highest degree characteristic. And it is precisely because of their

apparently slight importance that the person who sets out to imitate another's handwriting or to disguise his own is likely to be careless about these little marks and to make slips which will be sufficient to prove his identity."

It seems to be admitted that a person will make his terminals and punctuations with less consciousness than other parts of his writings. Consequently we find in terminals and punctuation marks a greater fixity of habit than is ordinarily present in other parts of writings.

(13) Bearing this in mind, it will be noticed that, in addition to the constancy with which Mrs. Brown adhered to certain loops, angles, movements and pen lifts, perhaps her most striking characteristic is found in the formation of periods and dots. Note the period following the initial J. This period is a dot. Under the microscope it is slightly horizontal. I have examined the periods in the exhibits submitted and the dots over the i's and am prepared to say that Mrs. Brown invariably made them, either by striking a slight perpendicular line or nearly so, or a slight curve to the right. Reference to the exhibits, especially the letter, which I have copied, illustrates this point. Moreover, no period is found after the initial J in any of Mrs. Brown's later signatures. So far as the record shows a period had not been used by her after the initial for nearly twenty years. I am not unmindful of the fact that Prof. Blair says that a period appears in one of the checks, and that counsel for contestants in putting a question to the witness may or may not have admitted this to be true. My own judgment is that no such period appears. In a check of date April 23, 1910, there is a pen mark which might be taken for a period, but I am convinced that it was never so designed by the writer. A period appears in some of the signatures found in the Whipple estate, 1891-1893. See Plate 3. These papers were public records and available to any interested party.

(14) In Mrs. Brown's writing there is a pen pressure from the beginning to the end of every word, with no hair

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lines or designed shadings. Her letters, and shadings if used, were made in a natural way. Under the microscope, Mrs. Brown's writing is heavy. In the questioned document, the upstroke of the S, the letters a-r-a, and the letter h, with the exception of the last part which is patched, are easy and flowing without pen pressure, and what may appear to be shadings are, in the main, retracings over a lighter line.

(15) It was not Mrs. Brown's habit to patch letters. In some instances there is a showing of a patch or retracing of some letter, betraying a purpose to complete the letter and not to finish it, so as to conform to her usual signature. There is a carelessness in it. There is no attempt to follow the lines of imperfect letters, whether made by bad ink or running out of ink. The many patches on the questioned writing follow with scrupulous care the original line, with the exception of the downstroke in the letter J in "Jan." where the ink seems to have run beyond the original border, and in the lower part of the same J where the first downstroke was carried lower and the point of the first line was abandoned.

(16) Mrs. Brown's S's and J's were as characteristic as the features on the face of a person. Whereas, the J in "Jan." and the J initial are so different from any of the authenticated J's and to each other as to make it extremely improbable that they were written by the deceased.

(17) Mrs. Brown had the habit of ending the downstroke of the figures 1, 4, 7 and 9, with a slight turn to the right or a slight hook turning to the right. These lines were invariably made with pen pressure. In the two downstrokes in the figure 14, neither of these characteristics are apparent.

(18) I note the fact that the witnesses to the will say that the signing was the work of but a moment. The purported signature bears indisputable evidence that it could not have been the work of a moment. Although Mrs. Brown wrote without hair lines or designed shadings, the retracings and building up of letters and lines betray a care and method

that must necessarily have taken some considerable time and attention.

(19) I have not discussed the pen lifts or pen propulsions because it is difficult to do so without immediate resort to the microscope. It is enough to say that the disputed writing contains many more pen lifts than in any made by Mrs. Brown.

It is a fact that a person will never write his signature twice in the same way.

"It is more surprising, at first thought, to be told that no person ever signs his name even twice alike. Of course, theoretically, it cannot be said that it is impossible for a person to write his name twice in exactly the same manner. A person casting dice might throw double aces a hundred times consecutively. But who would not act on the practical certainty that the dice were loaded long before the hundredth throw was reached in such a case? The same reasoning applies to the matter of handwriting with added force, because the chance of two signatures being exactly alike is incomparably less than the chance of the supposed throws of the dice.

"Probably many persons will not believe that it is impossible for them to write their own name twice alike. For them it will be an interesting experiment to repeat their signatures, say, a hundred times, writing them on various occasions and under different circumstances, and then to compare the result. It is safe to say that they will hardly find two of these which do not present some difference, even to their eyes, and under the examination of a trained observer aided by the microscope, these divergencies stand out tenfold more plainly." Lavay, Disputed Handwriting, 99-100.

But it is also a fact that there are general characteristics, certain singularities, formations, features, proportions and spacings, which are adhered to in greater or less degree which cannot be portrayed in words, but which nevertheless mark with unerring accuracy the pencraft of a certain individual. We are fortunate in this case in having many signatures for comparison, and equally fortunate in finding that Mrs. Brown's writing was not a flaccid, characterless hand. It

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fairly breathes character,—character so fixed that it is not concealed by a slight palsy of the fingers or the twinges of rheumatism, from which she suffered.

The books seem to agree that a person may lapse upon some of the characteristics of a fixed hand, and his signature could not for that reason be challenged, but just as an actor cannot simulate the voice, so a forger cannot simulate the sum of a writer's characteristics. It is the lack of these that may mark a forgery, however cleverly it may be executed. A person may omit some of his characteristics and his signature be real. A forger may make an accurate, or fairly accurate, copy or simulation of a signature and it may be as devoid of expression as a death mask or the face of a graven image. A person cannot simulate the characteristics of another's writing without betraying his own. There are strong characteristics in the proffered writing, which, under the microscope, are as noticeable as the features on a man's face. They are not Mrs. Brown's.

There is another element that is regarded by the writers on questioned documents as important. That is physical condition. The proffered signature is smoother, rounder, less nervous than any of the signatures of Mrs. Brown. It shows no evidence of infirmity. Compare it with the signature made December 31, next before January 14, 1910, and with "Jan." Its fullness and its freedom, the delicate lines and fashioned curves, especially in the letters "ara," indicate health and self-possession. By the great weight of the evidence, Mrs. Brown was sick with rheumatism during the winter and almost, if not all, of the month of January. Her foot was so swollen that she could not walk. She was waited on by neighbors. Yet we are asked to hold that on Jan. 14th she appeared to be a woman of forty or fifty years and was on the streets unattended, in apparent good health, capable of writing "ara" without a tremor, and, barring the Jan. and the two J's, the signature as a whole better than ninety-nine men in a hundred who are accustomed to writing could write

it. Rheumatism is an erratic master, as we all know, but it is not probable that he practiced such deception in his harvest month of January.

It is the opinion of Mr. Henley, a lawyer of quick and accurate perceptions, who did business for Mrs. Brown for many years, that the signature is a forgery, and of Mr. Gardner, paying teller of the Exchange National Bank, where she had her account, that it is not. Of Mr. Tiffany, paying teller of the Traders National Bank, where she formerly had an account, that the signature is spurious, and of Mr. Vincent, cashier of the Old National Bank, that he "believes" it to be genuine. Others differ in a like way. In passing upon the qualifications of the opinion witnesses, it should be borne in mind that Messrs. Gardner, Scale and Vincent, witnesses for the proponents, did not use any glass or express their opinions except upon general appearances. As one of the witnesses says, "general impressions," and as Mr. Vincent says, "experience," "instinct" and "general character." This witness further says that it is the custom of banks to pay on sight without making an analysis, and he held his theory good by refusing upon the stand to draw a comparison between the questioned document and an authenticated signature.

"I cannot conceive of an opinion worthy of consideration, for which a reason cannot be given; yet we have often heard such opinions given in court, and they have been accepted as expert testimony. When asked for his reason, one witness, a bank cashier, replied, 'Oh! I am so impressed; I cannot tell why.' It is scarcely creditable to any witness to express opinions for which he can give no reasons, or to a court to permit such to be given as expert testimony. For how can court and jury place the proper value upon opinions unsupported by reasons? Indeed, the value of expert testimony consists mainly in the ability of the witness, by reason of his special training and experience, to point out to the court and jury such important facts as they might otherwise fail to observe; and in so doing, the court and jurors are enabled to exercise their own vision and judgment respecting the co-

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gency of the reasons, and the consequent value of the opinion founded thereon." Ames, *Forgery*, 91.

It is only fair to say that Mr. Vincent disavows any of the qualifications of an expert.

It will be seen, therefore, that, after all, the opinions of these witnesses are of no greater benefit to us than our own opinion would be when based on casual inspection and comparison of writings.

Two experts of local fame and of ability, a Mr. Thompson for the contestants, and Professor H. C. Blair, for the proponents, are the important witnesses on this phase of the case. Mr. Thompson is attacked because of certain answers which it is said mark an egotism and conceit that makes his testimony incredible. Counsel for proponents express regret that the remarks of the trial judge, when deciding the case, are not in the record so that we can understand just how this witness was regarded by him. It may be true that the manner of the witness overcame the trial judge, but it affords no legal ground for the rejection of his testimony. Egotism, although always annoying, may be an asset or it may be a liability. It may be a vice or it may be a virtue. It all depends upon what is behind it; whether the victim can sustain himself. If the work and opinions of egotists were to be rejected because of the sole quality of egotism, many chapters of our history, both ancient and modern, would have been unwritten. I have read and reread Mr. Thompson's testimony. I have followed it through every letter and every exhibit referred to by him, and having in mind that it is the writing and not the man that is on trial, and that no client should be scotched because he has an egotist for an expert, I find, notwithstanding, that his opinion is well sustained and its force is amply demonstrated. Mannerisms may sometimes invite prejudice, when the assurance is only confidence or faith in one's opinion and which the assertive one stands ready to prove.

I believe Mr. Thompson sustains his opinion that the signature "Sarah J. Brown" is a forgery. To follow the thread of his testimony and that of Prof. Blair would run this opinion, not into pages, but into a volume, and I shall not undertake to do so. Suffice it to say that, in my judgment, Prof. Blair's opinion is not sustained. A reading and rereading of his testimony makes it certain that he occupied the only vantage ground there is in this case for the proponents, that is, to take the disputed signature, note the marked departures from fixed characteristics, and by search, find a verified letter here and there which corresponds in some degree with a questioned letter. By this test we fail utterly to get a perspective of the whole case and all the writings, and by reference to remote exceptions seek to establish a rule. We give no credit to fixed characteristics, and admit that they may all be violated within a range of two words, as they are in the proffered signature. Mr. Blair has found the few and rejected the many in an effort to find something like, for instance, the wide loop in the S, the Spencerian "a" and "r," the closed "a's" and the lack of the loop in the second "a." The fact that the wide loops and several pen strokes in the two J's are unlike anything that is acknowledged to be real, does not in any way challenge Prof. Blair's interest, although he says Mrs. Brown made her J's with only two strokes. He admits that the number of pen lifts is an important test upon which the authorities are agreed, and that he was informed that there was evidence of twenty-eight pen lifts in the disputed signature, whereas Mrs. Brown was accustomed to make less than ten pen lifts, yet he did not count or compare them in any way. Mr. Blair did not examine for the loop in the letter "a," although he admits its importance. He admits that the photographic enlargement of the questioned signature has every evidence of being retouched and that the J's are retraced, yet he did not examine other J's for evidence of retracings and retouching, and he admits that he found no other J that "came anyways near

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like it." Mr. Blair used a glass of more than ordinary strength, but did not use the microscope, which he does not seem to favor in his examinations. Mr. Tiffany speaks of the use of a glass. Assuming that he did not use a microscope but pursued the same methods employed by Mr. Blair he comes to an entirely different conclusion. In such cases, resort to a microscope seems essential. I have used a glass and a high powered microscope, and have found both of these instruments to be of great assistance in leading me over the doubtful places.

"The ends of justice are always served when means are provided to show the facts more clearly. The microscope provides such means and is simply indispensable if the facts in certain disputed document investigations are to be clearly shown; and a great variety of questions which it alone can answer arise in connection with a study of the various phases of forgery. In many instances its evidence is conclusive, and without such assistance as it gives we may indeed have eyes and see not." Osborn, *Questioned Documents*, p. 72.

Taking Prof. Blair's testimony as a whole, and without it the proponents' evidence on this phase of the case is weak indeed, I think the witness has looked only to the pictorial effect of the writing and has been deceived, for I will admit that the similarities pointed out by him may be found in the writings. No theory would be sound that depended upon a copper plate duplication of a signature. In fact, it would be evidence of the highest character that the duplication is a forgery. We may frankly admit that a departure from characteristics may be found in every signature. But no signature is offered, nor would any stand the test, where all of the exceptions concur to the exclusion of all of the habitual characteristics of the writer. Similarity alone proves nothing. Proponents seem to have assumed that it was incumbent on the contestants to prove the signature to be different from the true signature of Mrs. Brown, and have apparently made their case upon that assumption, whereas I under-

stand its similarity is admitted. The object of every forger, and this the court must keep in mind, is to make the signature seem true; to make it so as to deceive the eye. We expect to find form, otherwise the work of a forger would be futile. Forgeries are detected by other things. In this case, the writer of the questioned signature was more accustomed to the use of a pen than was Mrs. Brown. In doing his work he wrote the name, especially the letters "arah" and the letter "r" in Brown, better than Mrs. Brown ever wrote them or could have written them. His skill is his undoing. Measured through and through, Professor Blair's testimony is no more than an opinion such as any of us might express. Mr. Thompson's testimony goes further and when aided by the scientific methods of photography and microscopy, amounts to a demonstration. He is fully supported by Mr. Tiffany.

On the whole, the expert testimony preponderates in favor of contestants, and proves, with as much certainty as such testimony can, that the signature is false and forged, and this conclusion coincides with the impression made upon my mind by an examination of the documents in the record. As said in *Sharon v. Hill*, 11 Sawyer 290, 9 West Coast Rep. 1:

"The signature to the declaration is a good general imitation of the plaintiff's, and without special observation might easily pass for his."

After noting the differences in the signature proposed in that case, the court continues:

"And besides, and over and above all these particulars, there is a difference in the general effect and appearance of the signatures that is more readily felt than expressed.

"One may see at a glance that two pictures, which have a general similarity, are not portraits of the same person, when it might be difficult to give a satisfactory reason for the conclusion. The disputed signature is evidently the work of a skillful penman. The lines are comparatively smooth and steady, while the exact contrary is characteristic of the plaintiff's writing. Indeed, I very much doubt if he could write such a signature as the one to the declaration."

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I have passed, for the sake of brevity, many circumstances and comparisons that might have been made in support of my argument. In passing them it is not out of place to say that I have been impressed by the fact that among the great number of checks submitted by proponents for the purpose of comparing signatures, I find some written in every month of the year except January, for Mrs. Brown was a ready check writer. Inasmuch as she invariably used an abbreviation when writing the longer months of the year and must have used the abbreviation "Jan." such checks would have been invaluable for comparison.

Neither have I referred to the showing made upon a motion for a new trial. This being a trial *de novo* and certain letters there submitted being identified, I might have considered them, but have found enough to convince me without referring to the fact that, in answer to a letter written on Jan. 14th, 1910, by a relative in the east, Mrs. Brown replied on the 24th day of February, saying that she had received the letter in due time, which I may assume was about three days after the 14th, and that the letter "found me laid up with the rheumatiz, the first time for years—am better now but can't go out yet."

Counsel, in their zeal, have undertaken to fix responsibility for the forged will. The insinuations of counsel for contestants are met by proponents' counsel by suggestion of counter theories. It is not incumbent upon us to theorize or say who wrote the signature of Mrs. Brown to the will, nor is the record sufficient to warrant us in doing so if we were so inclined. However, in justice to the witness Lavender, it is but right to say that it is my belief that he was deceived by some person assuming to be Mrs. Brown.

From all of the opinions, from an inspection and comparison of all of the exhibits, after nearly four weeks of closest application, looking at the whole case from all its angles, I am prepared to say that the proffered writing is not the sig-

nature of Sarah J. Brown. The decree of the lower court should be reversed.

FULLERTON, J.—I concur in the opinion and conclusions of Judge Chadwick.

[No. 11256. Department Two. January 12, 1915.]

BERTHA LE CLAIRE, *Respondent*, v. WASHINGTON WATER
POWER COMPANY, *Appellant*.¹

MASTER AND SERVANT—SAFE PLACE TO WORK—NEGLIGENCE—HAZARDOUS EMPLOYMENT—OBVIOUS DANGERS. It is not negligence on the part of a master in failing to supply a safe place to work, rendering him liable for the death of an employee, in that he required the latter to work in a rowboat upon a stream impounded by a dam with spillways rendering the current swift, which was in places unsafe for a rowboat, where it was safe in the places where the men were required to work, if they used ordinary care, and where the danger was as open and apparent to the employee as to the master.

SAME—HAZARDOUS EMPLOYMENT—ASSUMPTION OF RISK—SKILL OF EMPLOYEE—REPRESENTATIONS TO MASTER. Where an employee of mature years undertakes to perform a service in a hazardous employment, representing that he had had experience, the dangers of which are open and apparent, he impliedly represents that he has sufficient skill to perform the service, and the employer is not liable to him for an injury resulting merely because he overestimated his qualifications.

SAME—DUTY OF MASTER—SAFE APPLIANCES—KNOWLEDGE OF SERVANT. In an action for the death of an employee resulting from loss of control of a rowboat occasioned by the slipping of an oarlock, the fact that the boat furnished by the employer was fragile and light, being a Mullin's steel boat, would not render the master liable, where it appears that it was a boat in common use, with no structural defects, that the employee was as cognizant of its strength or frailty as the employer, and that the slipping of the oarlock from its socket was the result not of the insufficient strength of the boat to stand the strain but of the manipulation of the oar.

SAME—USUAL APPLIANCES. The failure to fasten the oarlocks in their sockets so as to prevent their coming out by reason of faulty

¹Reported in 145 Pac. 584.

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Opinion Per FULLERTON, J.

manipulation of the oars cannot be charged as negligence on the part of the employer, where it was usual and customary to leave the oarlocks unfastened.

Appeal from a judgment of the superior court for Lincoln county, Baske, J., entered December 21, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Post, Avery & Higgins, for appellant.

Martin & Wilson, Arthur W. Davis, and Harry A. Rhodes, for respondent.

FULLERTON, J.—On July 19, 1910, the appellant, The Washington Water Power Company, was engaged in constructing a dam for a power site across the Spokane river at a place thereon called Little Falls. The dam as constructed extended from the east bank of the stream westerly for a distance of some 180 feet, whence it turned at a right angle to the south for a distance of about 1,000 feet to the west bank of the river, where the power house was situated. The main current of the stream struck the dam at its shorter arm, from whence it was diverted around the corner of the dam to the longer arm, where a channel had been formed of practically uniform width and depth, partly from the natural bed of the river and partly by excavation from the bed and the adjoining bank. In constructing the dam, three spillways had been left therein, one in the shorter arm about midway across the stream and the other two on the longer arm, but comparatively close to the angle in the dam. As the dam neared completion, it became necessary to close these spillways. To do this, the appellant stopped the flow of water by using timbers, some 12 inches square and 14 feet long, which it forced down over the openings and on them placed a canvas to prevent leakage. This stopped the flow of water and enabled it to fill the aperture with concrete. After the concrete was put in place, the pressure on the timbers was relieved and the timbers floated to the surface by reason of

their own buoyancy. After the middle one of these spillways had been filled in the manner described, the company next proceeded to fill the one across the shorter arm of the dam, and it was necessary to move the timbers to that place. To prevent the timbers from floating away after they came to the surface of the water, ropes had been fastened to them and to some fixture on top of the completed portion of the dam. After the filling of the first spillway, some four of these timbers had drifted towards the remaining spillway on that arm of the dam, and it became necessary to float them around the angle in the dam to a point from which they could be drifted to the spillway next desired to be filled. It was the opinion of the foreman that this could best be done with the aid of a boat.

The appellant had in its employ at that time a man, twenty-six years of age by the name of Edward Le Claire. He was working in what was known as "the rigging gang," whose duty it was to construct and keep in repair the necessary false work and rigging to enable the work on the dam to proceed. This rigging gang put in place the timbers to stop the flow of water through the spillways while they were being permanently filled with concrete.

After the work of filling the first spillway had been completed the foreman in charge of the rigging gang directed Le Claire and a man by the name of Peterson to go to the company's warehouse, which was situated some distance from the dam up the stream, and get a rowboat belonging to the company, bring it down to the dam, and tow the four logs before mentioned around the corner of the dam. It was testified that Peterson was an experienced boatman, and that Le Claire had also represented himself so to be to the foreman, and it is the foreman's testimony that these two were chosen to perform the work because of these facts. He nevertheless cautioned them to be careful in performing the work and not to approach too near the spillways. No direction was given as to which of the two men should handle the oars. The men

proceeded to the warehouse, procured and launched the boat, and brought it down the river to the face of the dam, Le Claire using the oars. The men towed with safety three of the timbers around the point of the dam, taking one of them at one trip and two at another. The fourth timber was somewhat nearer the spillway than the others, and was below a plank which projected from the dam into the water near its surface for a distance of some $3\frac{1}{2}$ or 4 feet. In removing this timber to get it around the projection, Le Claire chose to tow it directly out from the dam towards the middle of the stream. He had proceeded but a short distance when one of the oarlocks of the boat lifted out of its socket. Le Claire called to Peterson, who was sitting in the back of the boat holding the rope with which the timber was towed, to replace it. Peterson came forward and made two attempts to do so, but failed owing to the fact that a leather strap or string with which the oar lock was fastened to the boat got in his way. The boat was then drifting toward the spillway, and Peterson attempted to save himself by jumping overboard and swimming to the shore. Le Claire stayed in the boat and was carried down to and through the spillway and drowned.

The respondent, who is the widow of Edward Le Claire, conceived that her husband's death was due to the negligence of his employer, and brought this action to recover therefor. In her complaint, the respondent set forth a number of acts which she claimed constituted negligence on the part of the employer, all of which were put in issue by the answer of the appellant, who also set forth the pleas of contributory negligence and assumption of risk. The trial judge, however, submitted to the jury but four propositions, which he stated in the following language:

“(1) That defendant was negligent in that the place they ordered said Le Claire to work was hazardous and unsafe;

“(2) That the defendant was negligent in that Le Claire was unfamiliar with the work he was ordered to do on July 19, 1910, and was unaware of the dangers of the river, its rapid

flow and undercurrent at the place he was ordered to work, and that he was not informed in relation to these things;

"(3) That the defendant was negligent in providing a Mullins steel boat in which to work on said river, and that the same was too frail and light and so insufficiently braced that rowing in the current of the river, this caused the oar lock to come out.

"(4) That the oar locks in said boat were not securely tied so as to prevent the same from raising in their sockets and coming out, and plaintiff also alleging states that the defendant's negligence in all of these respects was the cause of her husband's death, and that there was no negligence on the part of E. L. Le Claire."

The jury returned a verdict for the respondent, and from the judgment entered thereon, this appeal is prosecuted.

The appellant, at the close of the case, challenged the sufficiency of the evidence to sustain a verdict against it, and the overruling of this challenge constitutes the first error assigned. It is our opinion that the challenge should have been sustained. After a careful study of the entire evidence, we are unable to conclude that it shows actionable negligence on the part of the appellant. The first claim of neglect of duty on the part of the appellant is that it did not furnish Le Claire with a safe place in which to work. In the sense that there was some danger attending the rowing of a boat in the vicinity of the spillways, this claim has foundation in fact. But this alone is not the measure of an employer's liability. Such a rule would make the employer an insurer and liable in every case of injury, as there is hardly any employment in which a person can engage that has not some attendant dangers. Particularly is this true where the employee is engaged to work about a dam across flowing water, or about machinery, or in work requiring the use of edged tools, or in work in which the instrumentalities used in its performance necessitate the use of skill or care. But in none of these cases is the master liable for an injury to his employee, merely because he suffers him to work about such places or with such in-

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strumentalities. The employer's liability arises in such cases only where the dangers are hidden or obscure, and the employee is ignorant of them, or of such a degree of immaturity that he cannot be expected to appreciate or understand them. Where the employee is of mature understanding, and the dangers of the employment are open to his observation, and can be avoided by the exercise of reasonable care on his part, the employer is not responsible for an injury arising therefrom. In other words, every employment has its own peculiar hazards, and the law does not hold the employer liable for such hazards as are ordinarily apparent and usually and naturally belong to the employment. These principles have been repeatedly laid down by this court, and, indeed, we think are not questioned anywhere. *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615, 47 L. R. A. (N. S.) 266; *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36; *Hanson v. Shipley*, 71 Wash. 632, 129 Pac. 377.

In the case before us, there was nothing concealed about the place of work. The water of the river had been impounded by a dam in which two spillways had been left open. Through these spillways the water rushed with great force, and for some space back of them the current of the stream was unsafe for a rowboat, but where the employees were required to work was attendant with no special dangers. They had but to exercise ordinary care to be safe. Furthermore, the dangers were open and apparent; as obvious to the employees as they were to the employer. We cannot think, therefore, that there is any room for the claim of negligence made in this regard.

Again, it is said that Le Claire was unfamiliar with the work he was ordered to do, was unaware of the dangers of the river, its rapid flow and undercurrent, and was not informed of these things by his employer. But here again we think the evidence fails. The evidence thought to show his unfamiliarity with the dangers attendant on rowing a boat upon a flowing stream was that of his relatives, who testified

that he had had no great experience in these matters. But their testimony, remote as it was from the real question, showed that his experience was much greater than that of the average person. But the direct testimony, as we have before stated, was to the contrary. He represented himself as having such experience, and was selected for the work because of this fact; he took control of the oars himself, notwithstanding an experienced boatman was sent with him; and he handled the boat with sufficient skill until he met with the mishap that caused his death. These were representations on which his employer had a right to rely, and it cannot be held liable for his death if he in fact misrepresented his ability to perform the particular work. Where an employee of mature years undertakes to perform a service, the dangers of which are open and apparent, he impliedly represents that he has sufficient skill to perform the service, and the employer is not liable to him for an injury caused thereby merely because he overestimated his qualifications. *Labatt, Master & Servant* (2d ed.), § 1148. But the case here is even stronger than the rule requires; there were the positive representations of the deceased as to his necessary skill.

Another contention is that the boat furnished by the appellant was unsuitable for the purposes for which it was directed to be used, that it was too fragile and light and insufficiently braced, and that these defects caused the oar lock to come out of its socket. Certain of the respondent's witnesses did testify that, in their opinion, the boat used was not as suitable for the purpose as another form of boat would have been. But clearly this does not fix liability upon the employer. The evidence was all to the effect that the boat was a standard boat, comparatively new, with no structural defects not common to its class, and of a kind in common use throughout the several states, upon streams and bodies of water of all kinds where row boats are usually in use. In fact it was the only boat mentioned in the testimony that was recognized by the witnesses by the mere mention of its name. Nor was there any testi-

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mony to the effect that the oarlock came out of its socket because of the insufficient strength of the boat to stand the strain of rowing. On the contrary, the evidence is to the effect that it was lifted out in a natural manner, and could have been replaced but for the interference of the strap with which it was fastened to the boat to prevent its loss overboard in case of the very accident that did happen to it. But more than this, the boat was before the employee. He knew the waters over which he was expected to row it. Its strength or frailty was apparent to him, and, whether it was suitable for the purpose, was as much within his knowledge as it was within the knowledge of his employer. It is not a case where a defective tool or instrumentality has been furnished an employee by his employer causing an accident, but a case where a standard and approved instrumentality was furnished, and an accident caused by faulty manipulation of the instrument furnished. An employer complies with his duty in this respect to his employee when he exercises reasonable and ordinary care in the selection of instrumentalities destined for his use, when he furnishes him with such as are in common use, without radical defects in themselves, even though it may be shown that there were better appliances for the particular purpose.

But it is said the oarlocks should have been fastened in their sockets so as not to come out even by faulty manipulation of the oar. Doubtless, had these oarlocks been so fastened, this particular accident would not have happened. But here, again, the evidence is all to the effect that such a process is unusual and not according to custom; that it was usual and customary to leave them unfastened. The evidence, in so far as it bore upon the question, tended to show that there were advantages and disadvantages attendant upon both, but it is clear that no negligence can be imputed to the employer when he furnished a boat equipped in this regard in the ordinary manner.

Much was said in the evidence concerning the velocity of the current of the stream, its undercurrents and the like. These matters we shall not discuss, as we do not find that they in any manner caused the unfortunate accident. Whatever may have been the velocity of the current, it could be traversed with safety by the use of ordinary care, and it is not even to be surmised from the evidence, much less was it shown, that any of these conditions caused the oarlock to come out from its socket. That the current of the river caused the boat to drift to a place of danger after the oar was rendered useless, is of course not to be questioned, but this was not the primary nor proximate cause of the accident. The cause of the accident was the faulty manipulation of the oar by Le Claire, and for this no recovery can be had of his employer.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

MORRIS, C. J., MAIN, ELLIS, and CROW, JJ., concur.

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Syllabus.

[No. 11679. Department Two. January 16, 1915.]

ANDREA RASMUSSEN, *as Administratrix etc., Respondent*, v.
NORTH COAST FIRE INSURANCE COMPANY *et al.*,
Appellants.

ANDREA RASMUSSEN, *as Administratrix etc., Respondent*, v.
DUBUQUE FIRE & MARINE INSURANCE COMPANY,
*Appellant.*¹

INSURANCE—FIRE INSURANCE—POLICY—FRAUD—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. In an action upon fire insurance policies, the verdict of the jury to the effect that the plaintiff had not knowingly made any false statements in representing the value of his stock of goods, cannot be disturbed merely because the jury, in answer to special interrogatories, fixed the amount of his loss at about \$2,000, the plaintiff claiming \$3,000 and the defendants claiming that the loss did not exceed \$1,200, where the estimates of experienced adjusters differed widely as to the probable loss and there was no suggestion of fraud or wrongful action in any other particular and no proof that plaintiff knowingly made any false statements.

SAME—ACTION ON POLICY—STATUTORY PROVISIONS—VALUE OF PROPERTY LOST—EVIDENCE—ADMISSIBILITY. In an action upon fire insurance policies on a stock of groceries, agents who wrote and issued the policies may be called by the plaintiff to testify to the value of the stock at the time the policies were written and at the time of the fire, under 3 Rem. & Bal. Code, § 8059-105, providing that every agent who issues a fire insurance policy shall be presumed to know the value of the property insured, and shall be punishable by fine in case he knowingly issues policies in excess of the value of the property; the evident purpose of the statute being to prevent over-insurance.

EVIDENCE—REBUTTAL—REPUTATION OF DECEASED PARTY—ADMISSIBILITY. In an action upon fire insurance policies, where the defense was that the insured, in making his proofs of loss, swore falsely, and fraudulently and intentionally overstated values and losses with intent to defraud, and where the insured died before the trial, it is admissible, in rebuttal of defendants' charges, to show the deceased's reputation for honesty and integrity.

¹Reported in 145 Pac. 610.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 14, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on fire insurance policies. Affirmed.

Zent, Powell & Redfield and *McBurney & O'Connor*, for appellants.

O. C. Moore, for respondent.

CROW, J.—These two actions, which have been consolidated, were commenced by J. K. Rasmusson on two separate policies of fire insurance for \$1,000 and \$2,000 respectively, executed and delivered to him by the defendant North Coast Fire Insurance Company, a corporation, and Dubuque Fire & Marine Insurance Company, a corporation, on a stock of merchandise in the city of Spokane. After the commencement of the actions and before trial, the death of J. K. Rasmusson was suggested, and Andrea Rasmusson, administratrix of his estate, was substituted as plaintiff. From verdicts and judgments in plaintiff's favor, the defendants have appealed.

For many years J. K. Rasmusson was engaged in the retail grocery business in Spokane and carried fire insurance on his stock of goods. On December 27, 1911, the appellant North Coast Fire Insurance Company executed and delivered policy No. 24,550 to Rasmusson, insuring his stock of groceries and certain fixtures against loss by fire in the sum of \$1,000. On August 9, 1911, the appellant Dubuque Fire & Marine Insurance Company executed and delivered policy No. 741,357 to Rasmusson insuring the same stock and fixtures against loss by fire in the sum of \$2,000. On January 26, 1912, while both policies were in full force and effect, the groceries and fixtures were damaged by fire. Mr. Rasmusson, in due season, prepared and delivered proofs to appellants, claiming the loss sustained by him exceeded the face value of the two policies. These proofs were re-

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jected by appellants who, in their answers, contend that his losses did not exceed \$1,200.

The policies each contained a stipulation which provided that "this entire policy shall be void . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." Basing their defenses on this provision, the appellants in substance alleged that Mr. Rasmusson made and delivered to each of them a false and fraudulent statement of his alleged loss, in that he stated that the same amounted to \$3,040.13, whereas it did not exceed \$1,200 in all; that he made such false statements with the fraudulent intent and design of inducing appellants to pay him the full amount of the policies; that he fraudulently represented that, within two years preceding the fire, he had purchased goods to the value of \$29,756.26, whereas his purchases during that period did not exceed \$23,797.11.

Mr. Rasmusson, in his reply, admitted that he made such statements in his proof of loss, and in response to interrogatories, but alleged that he then believed and still believes the same to be correct and true. The principal issues submitted to the jury were the extent and value of the stock of groceries and fixtures owned by the assured at the date of the fire, the extent of loss sustained, and whether the assured had, with fraudulent intent, misrepresented the value of his stock and fixtures and the extent of his loss with the design and for the purpose of defrauding appellants. The jury returned a general verdict, which included interest, in the sum of \$720.16, against the North Coast Fire Insurance Company, and in the sum of \$1,467.84 against the Dubuque Fire & Marine Insurance Company. The jury also answered special interrogatories as follows:

(1) What was the value of the goods, wares and merchandise (not including fixtures) at the store of Mr. Rasmusson at the time of the fire? Answer: \$2,100.

(2) What was the value of the goods, wares and merchandise (not including fixtures) at the store of Mr. Rasmussen immediately after the fire. Answer: \$162.

(3) What was the amount of damage to the fixtures covered by the policies of insurance in this case occasioned by the fire? Answer: \$250.

Appellants' principal contention is that the trial court erred in denying their motions for judgment notwithstanding the verdict, their position being that the undisputed evidence shows that the loss sustained by the assured did not exceed \$1,200; that he misrepresented the value of his stock of goods, the purchases made by him, and the extent of his loss; that he did so knowingly and wilfully with the intention and purpose of defrauding appellants, and that, under the provision above quoted, the policies were avoided by such fraudulent acts.

In their brief, appellants say:

"The Rasmussen proof of loss listed the value of the stock prior to the fire at \$2,750.67—the jury found it to have been \$2,100. The proof of loss claimed damage to stock of \$2,618.48, the jury placed it at \$1,938. The proof of loss claimed damage to fixtures as \$421.65; the jury found this item \$250. This is a reduction of a fraction over 25 per cent on the claimed loss to stock, and 40 per cent on fixtures."

They argue that the finding of the jury as to values amounts to a finding of fraud; that fraud is also shown by the undisputed evidence, and that it was the duty of the trial court to enter judgment in their favor. We have carefully examined the record and conclude that appellants' contention in this regard cannot be sustained. The estimates made by appellants' adjusters showing losses sustained, to a considerable extent, constitute evidence which they claim to be undisputed. Without these estimates and appellants' deductions therefrom, they would have no basis for their contention. These adjusters were appellants' representatives, who were looking after their interests and seeking to

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protect them. There is no more reason for accepting their estimates as undisputed than there would be for accepting the estimate prepared by respondent's representative, an experienced adjuster, as undisputed. The fact is that these estimates dispute each other, and the record shows that the evidence is otherwise conflicting. Appellants admit that, to sustain their defense, it is not sufficient for them to show that Mr. Rasmusson made false statements and that he padded his proofs of loss, but that it must also be shown that he did so knowingly and intentionally for the purpose of defrauding them. The evidence is too voluminous to be set forth or analyzed in an opinion of moderate length.

It appears that, at or about the time of the fire, the assured was in very bad health; that he died prior to the trial of these actions; that a dispute arose between him and the adjusters representing the appellants; that, when they advised him of their conclusions, he left them saying he would have nothing to do with their estimate, as his stock and losses were several times the values and losses fixed by them; that he procured the services of an experienced adjuster to prepare an estimate upon which to base proofs of loss, and that this adjuster and Mr. Rasmusson's son, a young man about twenty-one years of age, who had worked in the store for some time and had made purchases to replenish the stock, prepared an estimate. Their estimate and that of appellants' adjusters differed widely. The findings of the jury as nearly approximate that of the assured as those of the appellants' adjusters. There was no showing that the assured had recently increased his insurance, or that he was carrying over-insurance for fraudulent purposes. The policies were renewals of previous policies for the same amounts. No contention is made that the assured was in any way responsible for the fire. In fact, the evidence is clearly to the contrary. The agents who wrote the policies on behalf of the appellants, and who saw the stock of goods, gave it as their opinion that the assured had a stock

ranging in value from \$3,000 to \$3,500. There is no suggestion that they acted fraudulently or conspired with the insured for the purpose of writing excessive insurance. Nor is there any showing of any facts indicating a design on the part of the assured to over-insure or defraud the appellants at any time prior to the making of the proofs of loss. At that time, a sharp difference of opinion arose between him and appellants' adjusters. We cannot say, as a matter of law, that he then made any untruthful statements knowingly or with an intention of defrauding appellants. The trial court, by careful instructions which correctly stated the law, submitted the issues of false statements and fraudulent intention to the jury. To these instructions no exceptions have been taken. The jury have found against appellants, and our conclusion is that their verdict cannot be disturbed.

The plaintiff called as witnesses one J. H. Tilsley and one W. A. Junkin, the agents of appellants, who wrote and issued the policies of insurance. These witnesses testified to the value of the stock of goods and fixtures at the time the policies were written and also at or about the time of the fire. Appellants objected to this testimony on the ground that the competency of the witnesses was not shown. It appeared that Tilsley was in the grocery business for about nine years prior to 1900, and that Junkin had kept books in a grocery for about one year. The trial court, however, permitted them to testify by reason of § 105 of chapter 49, Laws of 1911, page 243 (3 Rem. & Bal. Code, § 6059-105), which reads as follows:

"Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on

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any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined in a sum not less than fifteen nor more than twenty-five dollars. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars."

The evident purpose of this section is to prevent over-insurance. It certainly contemplates that an agent, before placing a policy, will, by proper investigation, advise himself of the value of the property to be protected, and the presumption is that he has done so. In view of this statute, we can find no error in admitting the evidence of which appellants now complain. Other evidence tending to show value was also introduced by the respondent.

Mr. Rasmusson, the assured, died before the trial and his evidence could not be secured. Appellants by their evidence sought to show that, when he prepared, and by his oath verified, the proofs of loss, he fraudulently and intentionally overstated values and losses for the purpose of defrauding them. On rebuttal, respondent called a number of prominent business men of Spokane who had known Mr. Rasmusson during his lifetime. These witnesses, over appellants' objection, were permitted to testify that the reputation of Mr. Rasmusson for truth, veracity, honesty, and integrity was good. Appellants now insist that error was committed in admitting this evidence. They argue that, in civil actions, evidence of good character is not admissible except where character is directly in issue. In support of this position, they cite *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, and *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372, from this court, and additional authorities from other jurisdic-

tions. The case of *Carter v. Seattle*, was one to recover damages for personal injuries. Contributory negligence was pleaded and evidence was introduced by the defendant tending to show plaintiff's intoxication at the time of the injury. Thereupon plaintiff testified that he had not been drinking on the evening of the accident, and also introduced witnesses to testify to his reputation for sobriety. It was held that the admission of this evidence was erroneous. The character of the plaintiff for integrity was not in issue. Moreover, the plaintiff himself was present in court and testified. Assigning reasons for the ruling made, this court said:

"The general and well settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious and prudent; nor can it be shown that a party is habitually careless to support a claim of negligence upon a particular occasion. The principle underlying these cases and the case at bar is that such evidence raises a collateral issue not affecting the question to be determined."

This is not a case where the issue of negligence is involved. Here the assured, who was dead at the time of the trial and could not be called to testify, was positively charged with fraudulent acts and false swearing in his proof of loss for the purpose of securing a much larger recovery than that to which he was entitled. An examination of the case of *Poler v. Poler* will show that it has no bearing on the question now before us. It was there held that the defendant, in an action for divorce, could not introduce witnesses to show his general reputation as a law-abiding and moral man, that not being an issue in the case. While the general rule seems to be that character evidence is ordinarily inadmissible in a civil action, there is some conflict of authority and certain exceptions are recognized. We think an exception should be recognized in this case where the assured died prior to the trial and his evidence could not be pro-

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cured. The jury did not have an opportunity to pass upon his credibility by observing his appearance upon the witness stand. As above stated, it was charged by appellants that he had perpetrated a fraud and that in doing so he had sworn to false statements set forth in his proofs of loss. This amounted to a substantial charge of perjury. His denial of this charge could not be obtained. It seems to us that, under these circumstances, there was no error in permitting the plaintiff to show his reputation for honesty and integrity. There are courts that hold that, in civil actions, when the character of a plaintiff is assailed by the defense interposed, evidence of his good character is admissible. *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.), 40 S. W. 44; *Allison v. McClun*, 40 Kan. 525, 20 Pac. 125; *Houston Elec. Co. v. Faroux* (Tex. Civ. App.), 125 S. W. 922; *Cudlipp v. Cummings Export Co.* (Tex. Civ. App.), 149 S. W. 444.

We do not feel that we would be justified in holding the admission of the character evidence was prejudicial. The judgment is affirmed.

MORRIS, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 11941. Department Two. January 16, 1915.]

FLORESTINE PERRAULT, *Respondent*, v. EMPORIUM
DEPARTMENT STORE COMPANY, *Appellant*.¹

EVIDENCE—JUDICIAL NOTICE—RECORDS. The courts will take judicial notice of their records touching prior proceedings in the same case.

APPEAL—DECISION—LAW OF CASE—MATTERS DECIDED ON FORMER APPEAL. Under the rule that a decision on a former appeal becomes the law of the case and conclusive, the defendant, in prosecuting a second appeal (from the judgment entered on a new trial), cannot urge error in refusing instructions which were the same as those refused on the same issues and evidence on the first trial; although such error was not urged on the former appeal because defendant was not then seeking a new trial; since defendant speculated on defeating the former action on the facts alone and accepted as correct the law as then given in the instructions.

SAME. In like manner, the question whether plaintiff might have minimized the damages was involved in her motion for a new trial on the ground of inadequacy of damages, and the appellant, in then conceding that there was no abuse of discretion in awarding a new trial on that ground, is estopped on a subsequent appeal to raise the question on the same evidence.

APPEAL—REVIEW—HARMLESS ERROR. Technical failure to instruct the jury that damages for personal injuries must be no more than compensatory, is harmless, where from the evidence it appears that they were no more than compensatory.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 11, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a department store elevator. Affirmed.

Englehart & Rigg, for appellant.

John H. Lynch (*H. H. Wende*, of counsel), for respondent.

¹Reported in 145 Pac. 438.

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Opinion Per ELLIS, J.

ELLIS, J.—This is an action for damages, suffered by the plaintiff in attempting to step into an elevator owned and operated by the defendant in its department store. The case is here for the second time on appeal. On the first trial, the plaintiff recovered a judgment for \$800. A new trial was granted on the ground that the damages awarded were so inadequate as to show that the jury in reaching the verdict was influenced by passion and prejudice. In the course of the first trial, the defendant moved for a nonsuit, for a directed verdict, and for judgment *non obstante*. These motions were all overruled. The defendant's first appeal was from the orders denying all of these motions and from the order granting a new trial. On the first appeal no objection was made to its scope and all of these orders of the trial court were reviewed and the order granting a new trial was affirmed. That affirmance necessarily included an affirmance of the other orders appealed from. This is apparent from the following language found in the opinion on the first appeal:

"The several motions of the defendant for a nonsuit, a directed verdict, and a judgment *non obstante*, were denied, and the motion of the plaintiff for a new trial on the ground of inadequate damages appearing to have been given under the influence of passion or prejudice was granted. The defendant has appealed.

"It concedes that, if the court was not in error in denying its several motions, the order granting a new trial was not an abuse of discretion. Its contentions are, (1) that it was not guilty of negligence, and (2) that the respondent was guilty of contributory negligence materially contributing to and causing her injury; and hence that it incurred no liability." *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049.

Reference is also made to that opinion for a statement of the evidence, to which it is only necessary to add that there was some evidence tending to show that the plaintiff entered the store for a matter of her own convenience and neither

made nor attempted to make any purchase while there. There was also evidence that she refused for some time to submit to an operation advised by her physician who also told her that the operation might produce a stiff knee but that the danger of that result was not great. After taking treatment for a short time from an osteopathic physician, she finally underwent the operation at first advised. The result was satisfactory, though the knee at the time of the second trial was still weak and the limb slightly reduced in size.

On the second trial, the plaintiff recovered a verdict for \$1,500, for which amount and costs judgment was entered. Within the statutory time, the defendant moved for a new trial upon the grounds of insufficiency of the evidence and errors in law. This motion was overruled. From the judgment and from the order denying a new trial the defendant prosecutes this appeal.

The appellant urges a reversal upon three grounds, namely: (1) that the evidence tends to show that the respondent was in the store as a mere licensee and that the court should have given certain requested instructions covering that point; (2) that the court erred in refusing to give a requested instruction as to the duty of the respondent to have minimized her damages by earlier submitting to an operation; (3) that the court failed to instruct that the respondent in no event could recover more than compensatory damages.

We may preface the consideration of these points by calling attention to the following facts which will materially affect their decision:

The pleadings on the second trial were identical with those on the first. The instructions were in substance the same, save a slight difference in the instruction touching the measure of damages, to which we shall presently advert. The evidence was in every material particular the same on the first trial as on the second, save that on the second trial it was

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probably more definite than on the first that the elevator boy was at his post at the time of the accident holding the elevator door open as an invitation to the respondent to enter. If there was any other difference, the appellant has not attempted to point it out, and a careful examination of the record of both trials on our part has failed to reveal it. The appellant says there is nothing before this court showing that fact, but in their briefs both parties invite an examination of the record on the former appeal. Moreover, courts will take notice of their records touching prior proceedings in the same case. *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *O'Brien v. Washington Water Power Co.*, 79 Wash. 82, 139 Pac. 771; *Hays v. Mercantile Inv. Co.*, 73 Wash. 586, 132 Pac. 406.

(1) It is clear that the first point cannot be successfully invoked on this appeal. The question whether the respondent was in the store on business as an invitee, or for her own pleasure as a mere licensee, could only be material as bearing upon the extent of the appellant's duty to avoid causing her any injury while there—that is, as determining the degree of care imposed by law upon the appellant and as bearing upon the degree of care for her own safety incumbent upon the respondent. These were questions necessarily inhering in the determination of the main questions whether the appellant was guilty of any negligence imposing a liability, and whether the respondent was guilty of contributory negligence precluding her recovery, both of which were decided on the first appeal adversely to the appellant. The appellant now complains of the court's refusal to give a requested instruction to the effect that, if the jury should find from the evidence that the plaintiff entered the store for the sole purpose of her pleasure or convenience and made no purchase of anything for sale therein, then the verdict must be for the defendant, and also of the refusal to give another instruction to the same effect but stated at greater length.

The same instructions were requested and refused at the former trial. This, of course, is not the law, but it was as nearly the law, as applied to the same evidence, at the time of the former trial as it is now and should have been presented for determination on the first appeal if the appellant ever intended to raise the point or to claim error in the instructions touching the measure of liability as actually given.

The appellant urges that it was not then seeking a new trial, hence, could not argue errors in the instructions. The situation presented is just this. The appellant was willing to accept the law of the case as given to the jury by the court's instructions on the first trial, rather than ask for a new trial on the ground of errors now claimed in the law as given. It staked its whole case on the chance of defeating the action *in toto* on the ground of absence of any negligence or liability on its part, or on the ground of contributory negligence on the respondent's part. As shown by the former opinion, it conceded that, if these claims were not well taken, there was no error in granting a new trial on the sole ground of inadequacy of the damages. In effect, it thus admitted that the only error consisted in not taking the case from the jury on the evidence. The appellant was willing to speculate on the chance of defeating any recovery by the first appeal on the facts alone, and accepted as correct the law of the case as given in the court's instructions. The law of the case as applied to the same facts, shown by the same evidence, was thus settled for all time. This court has often said that it will not entertain appeals piecemeal. In an unbroken line of decisions we have consistently held that questions determined on appeal, or which might have been determined had they been presented, will not be considered upon a second appeal of the same action. As to such questions the first appeal conclusively settles the law of the case. *State v. Boyce*, 25 Wash. 422, 65 Pac. 763; *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632; *Wheeler*

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v. Aberdeen, 47 Wash. 405, 92 Pac. 135; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 62 Wash. 436, 113 Pac. 1104; *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038; *Pattison v. Seattle, Renton & S. R. Co.*, 64 Wash. 370, 116 Pac. 1089, 35 L. R. A. (N. S.) 660; *Forrester v. Reliable Transfer Co.*, 65 Wash. 602, 118 Pac. 753; *O'Brien v. McKelvey*, 66 Wash. 18, 118 Pac. 885; *Budman v. Seattle Elec. Co.*, 67 Wash. 133, 120 Pac. 877; *Provine v. Seattle*, 70 Wash. 326, 126 Pac. 927; *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840; *Boothe v. Summit Coal Min. Co.*, 72 Wash. 679, 131 Pac. 252.

(2) A consideration of the second question is even more distinctly foreclosed by the former appeal. The respondent's motion for a new trial at that time was upon the ground that the damages awarded by the jury were inadequate. Whether the respondent might have minimized the damages, by submitting to an earlier operation, was clearly involved in the question of adequacy of damages there presented. The appellant, by then conceding that there was no abuse of discretion in awarding a new trial on that ground if it was liable for any damages, is estopped to raise the question now upon the same evidence. It is a question which not only could have been, but in all propriety ought to have been raised on the first appeal, if at all. Moreover, an examination of the evidence as adduced at both trials convinces us that, if the appellant is liable at all, a question concluded by the first appeal, the damages awarded are no more than adequate to compensate the respondent for her injuries regardless of any minimization. In fact, it is not seriously contended that the damages awarded are excessive.

(3) What we have already said also disposes of the third question. There being no serious contention that the damages awarded are excessive, in view of the serious character of the injury and the pain and suffering, loss of time and expense to which the respondent was subjected, the technical error in the instruction, in that it failed to advise the jury

that the damages awarded must be no more than compensatory, was clearly immaterial. Demonstrably, it had no prejudicial effect.

The judgment is affirmed.

FULLERTON, MOUNT, CROW, and MAIN, JJ., concur.

[No. 12031. Department Two. January 16, 1915.]

MONDIOLI & STEWART, *Respondents*, v. AMERICAN BUILDING COMPANY, *Appellant*.¹

APPEAL—RECORD—EVIDENCE — ABSTRACT — NECESSITY. Where no question is made upon the evidence, appellant need not bring it up on appeal or abstract it, or make any reference to it in the abstract.

APPEAL—BRIEFS—REFERENCE TO ABSTRACT. An appeal will not be dismissed for failure of the brief to refer to the abstract, where the only point made is on the findings, which are in the abstract and quoted in full in the brief.

MECHANICS' LIENS — FORECLOSURE — CONDITIONS PRECEDENT — AMOUNT DUE. In an action to foreclose a mechanics' lien, the plaintiff is not entitled to judgment until the debt is due.

INDEMNITY—CONTRACTS—AMOUNT DUE—CONDITIONS PRECEDENT—BONDS—CONSTRUCTION. Under an indemnity bond given by building contractors to the owners, conditioned to defend and save the owners harmless from the claims of the D. company and further providing that the final twenty per cent payment under the contract should be retained as additional indemnity until the obligors obtained a receipt in full from the D. company or until its claims should be outlawed, such final twenty per cent is not due until the happening of one of the conditions precedent stipulated in the bond; until which, judgment cannot be entered on the contract in favor of the contractors, if the sum unpaid is less than the twenty per cent to be retained as indemnity.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered January 17, 1914, upon findings in favor of the plaintiffs, in an action to foreclose a mechanics' lien. Reversed.

¹Reported in 145 Pac. 577.

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Opinion Per MOUNT, J.

Wakefield & Witherspoon (Harry T. Davenport, of counsel), for appellant.

Edwin H. Flick and Hamblen & Gilbert, for respondents.

MOUNT, J.—This action was brought to foreclose a lien against certain property belonging to the American Building Company. The cause was tried upon issues made by the pleadings, and resulted in a judgment in favor of the plaintiffs and against the American Building Company for \$1,928.86. The American Building Company has appealed from that judgment.

The respondents move to dismiss the appeal for the reasons, first, that the testimony has not been brought up and has not been abstracted; second, because the abstract makes no reference to the evidence; and third, because the brief of the appellant makes no reference to the pages of the abstract. In answer to the first two grounds of this motion it is sufficient to say that the appellant makes no question upon the evidence. It relies wholly upon the findings made by the trial court. It was therefore unnecessary to bring the evidence here. The appellant has not referred to the pages of the abstract in its brief. But the findings relied upon are in the abstract and are quoted in full in the brief; and we think the cause ought not to be dismissed because the pages of the abstract are not referred to in the brief. The motion is therefore denied.

It appears from the findings of the trial court that, on the 5th day of May, 1910, the respondents and the appellant entered into a contract whereby the respondents agreed to do certain plastering upon a building being constructed by the appellant in the city of Spokane, according to plans and specifications prepared for the work. The contract provided, at article 3, as follows:

“No alterations shall be made in the work except upon written order of the architect, the amount to be paid by the

owner, or allowed by the contractors by virtue of such alterations to be stated in said order. . . .”

The contract also provides, at article 9:

“It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractors for said work and materials shall be \$14,710, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractors in current funds, and only upon certificates of the architect as follows: Payments to be made to the amount of eighty per cent of the work done on the building every two weeks.”

It seems that, before this contract was entered into, the American Building Company had some negotiations with a company known as the Architectural Decorative Company for doing the work, and there was some fear that that company might claim the contract under these negotiations. Before letting the contract in question to the respondents, the appellant required of the respondents a bond in the sum of \$2,950 to the effect that they would save the appellant from any liability to the Architectural Decorative Company in case that company should make a claim against the appellant. This bond was furnished by the respondents, and recited that:

“Whereas, the principals herein, to wit, the copartners of Mondiola & Stewart, are desirous of obtaining the contract for the work mentioned on the building of the American Building Company and have agreed to indemnify and save harmless the American Building Company in the manner above mentioned;

“Now, therefore, the condition of this obligation is such that if the above bounden William Stewart and A. Mondiola, copartners doing business as Mondiola & Stewart, . . . shall defend and keep harmless and indemnify said American Building Company, its successors or assigns, from all claims, demands, liabilities or claims for damage or damages that the said Architectural Decorative Company might have or claim against the said American Building Company, . . . then the above written bond to be void, otherwise the same to remain in full force and effect.

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"It is further agreed that the American Building Company may and shall retain the final twenty per cent payment under its contract to be entered into with the principals herein, as additional indemnity against any costs, expenses or damages or claims of the Architectural Decorative Co. against the American Building Co., said twenty per cent to be retained until the principals herein shall have obtained a receipt in full of all claims and demands of the Architectural Decorative Co., or until any claims that said Architectural Decorative Co. might have shall have been outlawed by the statute of limitations."

This bond was given as a part of the contract. The court so found.

Upon the trial of the case, the court found that this contract had been entered into between the parties; that the work upon the building had been done by the respondents; that the respondents had been paid by the appellant the full sum of the original contract price with the exception of \$51, but that extras had been ordered and put into the building which amounted to \$1,868.46.

The court also found as follows:

"The court further finds that at the time of the entering into the contract between plaintiffs and defendant, plaintiffs entered into a bond of indemnity whereby they agreed that they would procure from the Architectural Decorative Company a receipt and release from any and all claims which said company might have against the American Building Co., and in addition thereto as an additional indemnity, the defendant herein should retain twenty per cent of the payment under the contract entered into with the plaintiffs as a guaranty against any cost, expense, damage or claims of the Architectural Decorative Co. against the American Building Co., and until such receipt and release was obtained by the plaintiffs from the Architectural Decorative Co., or until the claim of the Architectural Decorative Co., if any it had, was outlawed by the statute of limitations."

And as conclusions of law, the court found:

"That the plaintiffs herein are entitled to judgment against the defendant for the several amounts found due, as

set out in the foregoing findings, making a total amount of \$1,928.86, but that such judgment rendered herein shall be stayed until the plaintiffs have furnished to the defendant a release for any claims the Architectural Decorative Company might have as referred to in said bond, and as an indemnity and guaranty of the plaintiffs against any costs, expenses, damages or claims of the Architectural Decorative Company against the defendant, American Building Co., or until such release and receipt is obtained by the plaintiffs from said Architectural Decorative Co., or until the claim of said Architectural Decorative Company, if any, is outlawed by the statute of limitations; and no interest shall be allowed on said judgment until the terms of said bond of indemnity have been fully complied with."

Thereupon a judgment in accordance with these conclusions of law was entered by the trial court. In short, the trial court found that the appellant was indebted to the respondents in the sum of \$1,928.86, but that this sum was not due at the time the action was brought, nor at the time the judgment was entered.

It seems too plain to admit of serious discussion that, where a debt is not due, there is no right to a judgment. In the case of *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 132 Pac. 867, where an action was brought to foreclose a lien for money not due, we held that the lien could be foreclosed only for the payments which were past due. In that case we said:

"The right to a lien claimed for materials and labor not being waived, the question then arises as to the amount for which the lien may be foreclosed in the present action. From the facts above stated, it appears that, when the suit was instituted, four payments, totaling the sum of \$1,000, were past due. The action, however, sought to recover \$1,765, the total amount of the debt. It is argued that failure to meet the payments as they became due caused the entire debt to mature and become at once payable, notwithstanding the specifications as to the times of payment, but this contention cannot be sustained. There is no clause in the note providing that, in the event the payments are not made at the time

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specified, that the whole sum shall, or may at the election of the creditor, become due and payable, in the absence of which, delinquency as to certain payments does not mature the entire debt. In *Foxell v. Fletcher*, 87 N. Y. 476, it is said:

“At the time this action was commenced, two of the monthly installments had become payable, but it does not follow that the whole debt had become due. The debt was, by the agreement and in consideration of the security given, changed from one payable immediately to one payable in monthly installments, and in the absence of a stipulation that, on default in the payment of any of these, the whole should become due, the plaintiffs were entitled only to recover the installments due at the time of the commencement of the action. They cannot now recover more, without taking the necessary steps to enable them to bring in installments accruing since the commencement of the action.’”

We know of no case, and certainly none is cited, to the effect that a judgment may be had for a debt not due. In this case, it is plain from the findings of the trial court that, while the defendants are indebted to the plaintiffs in the sum of \$1,928.86, yet, under the terms of their contract, this amount was not to become due until the happening of an event which, so far as the record shows, has not yet transpired.

It is apparently claimed by the respondents that the appellant was entitled to retain twenty per cent of the original contract price, which it did not retain, but was not entitled to retain any part of the amount of the extras furnished; and that the amount for extras is now due. But we think the contract is not susceptible of this interpretation. As stated above, the contract provides for alterations to be made upon the order of the architect. This clearly refers to extra work to be done. In article 9 of the contract, as quoted above, it is stated that the sum to be paid by the owners for the work and material shall be \$14,710, “*subject to additions and deductions as therein before provided.*” This of course refers to extras which may be added to, or which may be deducted from, the contract price. The twenty per cent provided for

refers to the whole work under the contract. It is conceded that, at the time this action was brought, the defendants were holding less than twenty per cent of the contract price with extras. The court properly found, therefore, under the contract, and under the conceded facts in the case, that this \$1,928.86 was not due; and not being due, it follows, as a matter of course, that judgment should not have been entered therefor. This being true, there was nothing for which the court could enter a judgment. The case is like one where a building has not been completed and a party seeks to obtain a judgment for the contract price when the work has not been done. Where the parties have, by their agreement, made some act or condition precedent to payment, that act or condition must be fulfilled before the payment is due. *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Harmon v. Ashmead*, 60 Cal. 439.

We are satisfied that the trial court, upon the findings made, should have dismissed the action. The judgment is therefore reversed.

CROW, MAIN, ELLIS, and FULLERTON, JJ., concur.

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Opinion Per MAIN, J.

[No. 12089. Department Two. January 16, 1915.]

B. F. ALLISON, *Respondent*, v. CHICAGO, MILWAUKEE &
ST. PAUL RAILWAY COMPANY, *Appellant*.¹

RAILROADS—INJURIES AT CROSSINGS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The plaintiff was guilty of contributory negligence, as a matter of law, in running his automobile into a train on a spur track crossing a city street, in the nighttime, where it appears that the automobile was traveling fifteen miles per hour and could have been stopped within fifteen or twenty-five feet, that its headlights enabled the plaintiff to see an object within a radius of one hundred feet, which was the width of the street, that the train, with signal lights in view, was moving at about four miles an hour and was stopped before the collision within four feet, after having moved into the street sixty or seventy feet, and the box car first coming into the street was struck with great force by the automobile within eight feet of the front end of the car; since it is clear that the train came within the zone covered by the headlights and could or should have been seen by the plaintiff in time to have avoided the accident, when in fact, plaintiff did not see the train until the moment of the impact.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 14, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained at a railroad crossing. Reversed.

Geo. W. Korte and *H. S. Griggs*, for appellant.

Dunkleberger & Heinly, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries and for damages to an automobile. The cause was tried to the court and a jury. The plaintiff obtained a verdict for \$575. From the judgment entered upon the verdict, the defendant appeals. At appropriate times, the appellant made motions for nonsuit, directed verdict, and judgment notwithstanding the verdict.

¹Reported in 145 Pac. 608.

The accident occurred on Pacific avenue, in the city of Tacoma, Washington, at a point about thirty feet south of the intersection of Twenty-sixth street with Pacific avenue. Almost opposite Twenty-sixth street, Delin street intersects Pacific avenue. On Pacific avenue there are two street car tracks at the point of collision. The street at this point is one hundred feet wide. The grade of the street at the point in question is four per cent rising to the south. Crossing Pacific avenue from east to west, and about thirty feet south of the intersection of Twenty-sixth street, is a spur track of the defendant company. This company has a franchise permitting the operation of trains over this track between one and five o'clock in the morning. At the intersection of Delin street with Pacific avenue, there is an arc light. At the northwest corner of the intersection of Twenty-seventh street with Pacific avenue, there is an arc light, Twenty-seventh street being the next street south of Twenty-sixth street.

The plaintiff resides about one and one-half miles east of Parkland, which is approximately twelve miles south of Tacoma. The plaintiff, in going to Tacoma from his ranch and in returning, passes in and out over Pacific avenue. On the evening of May 3, the plaintiff left his ranch in his Pony Tonneau Chalmers-Detroit automobile. It was a thirty horse power car, built for four people. The plaintiff knew that the spur track crossed Pacific avenue, and had frequently passed over it, but testified that at no time had he ever seen cars upon the track. The respondent had driven an automobile for about seven years. His eyesight and hearing were good. Some years before he had been in the railway service as a brakeman.

On the evening of the day mentioned, he reached the city about 6:30 p. m., and from that time until 1:30 in the morning spent the time about the business section of the city, attended the Empress theater, and started home about 1:30. The night was a little misty, dark, or cloudy. Some of the

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witnesses testified that it had been raining a little earlier in the evening. The pavement was wet. In going home, he was proceeding up Pacific avenue. At some point before reaching Twenty-sixth street, he met a street car. At this time, the defendant company was moving a train consisting of one box car loaded with flour, an engine, and tender, over to Commerce street, which was to the west of Pacific avenue. Going west, the box car was in front, and between the box car and the engine was the tender. This train, when it approached Pacific avenue, stopped for the street car to pass. At this stop, the end of the box car was about even with the sidewalk. According to the appellant's evidence, there were two brakemen on top of the box car, one near either end, each of whom had a lantern. When the train approached Pacific avenue, these brakemen signaled to stop; and the train was stopped until the street car had passed. After the street car had moved on, the brakemen, or one of them, then signaled for the train to start, and the signal was communicated by the fireman to the engineer. The train moved out into Pacific avenue at the rate of approximately three or four miles per hour. On the northwest corner of the box car was a red light. As the train came out upon the avenue, the plaintiff was approaching from the city. The brakemen testified that they saw him coming and that one of them signaled to him with the lantern from the top of the car to stop. But he not heeding the signal, and it becoming apparent that a collision was imminent, a signal was given for the train to stop. The emergency brakes were set and the train came to a standstill within about four feet. The plaintiff's automobile hit the box car about eight feet from the west end, demolishing the automobile to such an extent that it was deemed inadvisable to have it repaired. When the collision occurred, the train had moved out into the street a distance of sixty or seventy feet. The plaintiff was injured in his stomach and short ribs.

As to the manner of the accident, the plaintiff testified:

"The first indication I had of any obstruction in the street was, I noticed a car move up in front of me. The first thing I noticed to be certain of was the white letters on the dark brown. When I saw it I did all I could to stop. I slammed on the brakes for all I was worth and tried to stop, but I was very close to them. The color of the street and the color of the box car are so very alike at night you could not tell the difference."

Also: "I did not see them until I was right into them." He also testified that the lights upon his automobile were burning—this was denied by other witnesses—and that by means of these lights an object could ordinarily be seen within a radius of one hundred feet. He testified that there were no lanterns in sight, and that the arc light at the corner of Delin street and Pacific avenue was not burning.

Witnesses other than those who were members of the train crew and who were disinterested, testified that the red light was on the northwest corner of the box car; that the two brakemen were on top of the car, each with a lantern. One witness testified that the arc light at the northwest corner of Twenty-seventh street and Pacific avenue was burning. This does not appear to be denied.

The headlights of the plaintiff's automobile would light a zone of the street fifteen feet wide. The plaintiff testified that, at the time of the collision, he was going fifteen miles an hour in intermediate gear with one cylinder missing; and that he could stop the car within a distance of fifteen feet.

Whether the defendant's positive testimony that the red light was on the northwest corner of the box car and that the two brakemen were on top of the car with lanterns and that there was a headlight on the end of the tender next to the box car is sufficient to overcome, as a matter of law, the negative testimony of the plaintiff that there were no lights or anything of that kind, we need not determine. Neither do we need to determine whether the defendant was negligent in failing to have a flagman on the ground to prevent the

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driver of an automobile from running his machine into the side of the box car. Aside from these questions, there are certain uncontrovertible facts, and facts which are controverted but which will be assumed to be in the plaintiff's favor, which bar a recovery. These facts are:

The automobile was traveling fifteen miles an hour. It could be stopped within fifteen feet. The headlights upon the automobile enabled the driver to see an object within a radius of one hundred feet. The arc light at the northwest corner of Pacific avenue and Twenty-seventh street was burning. The train was moving at a speed of about four miles an hour and was practically at a standstill when the collision occurred. The automobile struck the box car approximately eight feet from the west end thereof. If these facts are true, then the end of the box car came within the zone covered by the headlights on the automobile when the automobile was more than thirty feet distant. The box car, after coming within the zone of the lights, traveled twelve or fifteen feet going three or four miles per hour. While the box car was traveling this distance, the automobile going fifteen miles per hour would travel approximately forty feet. If, then, the automobile could be stopped within a distance of fifteen feet, or even within a distance of twenty-five feet, it is vividly apparent that the plaintiff saw, or should have seen, the box car in time to have avoided the collision. The fact is that he did not see it until almost the instant of the impact. One of the plaintiff's witnesses testified that he was two blocks away and heard the crash when the collision occurred. This seems to be one of those cases where the facts speak the law. The accident was plainly due to the respondent's contributory negligence.

The judgment will be reversed and the cause remanded with direction to dismiss the action.

Crow, Mount, Ellis, and Fullerton, JJ., concur.

[No. 12134. Department Two. January 16, 1915.]

HENRY HARBICAN, *Respondent*, v. WILLIAM N. SKINNER
et al., *Appellants*.¹

EVIDENCE—PAROL EVIDENCE—CONSIDERATION OF MORTGAGE—COLLATERAL AGREEMENT. It is competent to show by parol the true consideration for executing a note and mortgage; hence it is admissible to show an oral collateral agreement whereby the mortgagee agreed to pay a street assessment then due and certain insurance premiums, which, by the terms of the mortgage, the mortgagors had agreed to pay, and which the mortgagors orally agreed to repay when the first installment of interest became due.

SAME—PAROL EVIDENCE TO VARY WRITING—INCONSISTENCY—MORTGAGES—CONSTRUCTION. An oral agreement by a mortgagee, at the time of the execution of a note and mortgage, to pay a street assessment then due and certain insurance premiums, which the mortgagors orally agreed to repay when the first installment of interest became due, is not inconsistent with the terms of the note and mortgage, requiring the mortgagors to pay all assessments, taxes and insurance, on pain of having the whole sum declared due and payable; in view of a provision to the effect that, upon failure of the mortgagors to make any payments when due, the mortgagee may, at his option, pay any such sums, which shall be secured by the mortgage and draw interest; since this clause authorized the mortgagee to exercise his option of paying these items.

MORTGAGES—CONSTRUCTION—DEFAULTS—MATURITY OF DEBT—OPTION TO DECLARE. An oral agreement by the mortgagee on the execution of a mortgage to pay street assessments and insurance then due, the same to be repaid by the mortgagors when the first installment is due, will be held an exercise of his option, provided in the mortgage, to pay any such sums upon failure of the mortgagors to do so, and have them secured by the mortgage, with interest; hence he cannot declare the whole sum due for defaults of the mortgagors, until after such repayments become due under the oral agreement.

Appeal from a judgment of the superior court for Spokane county, Jackson, J., entered January 22, 1914, upon findings in favor of the plaintiff, in an action to foreclose a mortgage. Reversed.

Belden & Losey, for appellants.

Cordiner & Cordiner, for respondent.

¹Reported in 145 Pac. 582.

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Opinion Per MOUNT, J.

MOUNT, J.—This is an action to foreclose a mortgage for \$5,000 upon certain real estate in Spokane county. Upon a trial of the issues made by the pleadings, the court entered a decree of foreclosure. The defendants have appealed.

It appears that, on April 29, 1913, the note and mortgage in this case were executed by the appellants. The mortgage provides:

“The mortgagors agree, during the continuance of this mortgage, to pay all taxes and assessments levied and assessed upon said premises and upon this mortgage or upon the debt hereby secured at least ten days before delinquency; to keep the premises free from all incumbrances; not to commit or suffer waste thereon; to complete all buildings in course of construction or about to be constructed thereon within six months from date hereof; to keep all buildings thereon in good repair and continuously insured in a company to be named by the mortgagee in a sum not less than \$5,000, loss payable to mortgagee, and to deliver all policies of insurance to the mortgagee. Should the mortgagors fail to keep any of the foregoing covenants, then the mortgagee may at his option carry out the same, and all expenditures therefor shall draw interest until repaid at the rate of twelve per cent per annum, be repayable by the mortgagors on demand, and shall be secured by this mortgage. Time is material and of the essence hereof, and if default be made in the payment of any of the sums hereby secured, or in any of the covenants herein contained, then, in such or either of said cases, the balance of unpaid principal with accrued interest, and all other indebtedness hereby secured, shall at the election of the mortgagee become immediately due, without notice, and this mortgage may be foreclosed.”

The note which was secured by the mortgage was a coupon note, to which were attached ten coupons for \$200 each, all dated April 29, 1913. The first coupon by its terms became due and payable on October 29, 1913. The note provided that,

“In case of the failure to perform any of the covenants contained in the mortgage securing this note, thereupon the

said principal sum and coupons shall immediately become wholly due and payable without further notice."

The complaint alleged that the mortgagors had failed to pay an assessment levied against the premises, and had failed to pay the premiums upon an insurance policy and, for that reason, the respondent declared the principal sum together with interest thereon due. The action was begun on August 18, 1913, less than four months after the making of the note and mortgage.

The principal defense was, in substance, that at the time the notes and mortgage were executed it was agreed between the parties that the respondent would pay a street grade assessment and the taxes then due upon the property, and would pay the necessary premiums upon insurance policies which were to be transferred to the respondent. Those were the items which the respondent claimed should have been paid by the appellants, and because of their nonpayment the respondent claimed the right to declare the whole debt due.

Upon the trial of the case, when the appellants attempted to prove this defense, an objection was made upon the ground that this was an attempt to contradict the terms of the mortgage. The trial judge expressed the opinion that this objection was well taken, but overruled the objection and heard the evidence. At the conclusion of the case, the court disregarded this testimony for the reason that, in his opinion, it tended to vary and contradict the terms of the mortgage, and for that reason refused to consider it or make any finding thereon. The only question in this case is whether this defense can be proved.

The testimony is clearly sufficient to show that the oral agreement was entered into at the time the mortgage was made, as contended for by the appellants. We think the evidence very clearly shows that there was a street assessment due upon the property at the time the mortgage was made, and the evidence very clearly shows that the parties to the mort-

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gage discussed this fact. They also discussed the payment of the necessary premiums for the insurance policies. The plaintiff testified that no other agreement was made than that contained in the mortgage. The great weight of the evidence is to the effect that, at the time the mortgage and note were executed, the respondent agreed to pay this street assessment, and also the premiums upon the insurance policies, and that these sums should be repaid by the mortgagors at the time the first coupon note matured. We are satisfied from the whole evidence that this was a part of the consideration for the execution of the note and mortgage.

The rule is well settled in this state that the real consideration for a mortgage or for a deed may be proved by parol testimony. In the case of *Windsor v. St. Paul M. & M. R. Co.*, 37 Wash. 156, 79 Pac. 613, we held that while the terms of a written contract may not be varied by parol, it is competent to show that at the time of making a contract there was a collateral oral agreement to the effect that certain fences and guards were to be built and maintained by the company as a part of the consideration for the sale, and that oral testimony is competent to show a consideration additional to that expressed in the contract. At page 161, quoting from *Kickland v. Menasha Wooden-Ware Co.*, 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831, we said:

"It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed."

And in quoting from *Shephard v. Little*, 14 Johns. 210, we said:

"Although you cannot, by parol, substantially vary or contradict a written contract, yet these principles are inapplicable where the payment or amount of the consideration becomes a material inquiry."

And in *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435, we said, quoting from *Quarles v. Quarles*, 4 Mass. 680:

"The principle is, I think, most clearly established, that when one consideration is expressed in a deed, any other consideration *consistent* with it may be averred and proved."

And in *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892, we said, quoting from *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 761:

"The consideration recited in the deed is 'for the purpose merely of giving it effect as a conveyance, and that for any other purpose parol evidence may be given to show that the real consideration was greater or less than the sum named.' Per Cooley, J. in *Strohauer v. Voltz*, *supra*. And that great judge adds that the cases holding this view 'are not . . . out of harmony with the general rule which excludes parol evidence to control writings.'"

See, also, *Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720.

We are satisfied that this is the correct rule. It is plain from the evidence in this case that, at the time this note and mortgage were made, the fact was discussed that the street assessment against part of the property was then due if not delinquent; it was agreed that it would be necessary to have certain insurance policies which were then upon the property transferred to the mortgagee; and we think the evidence is sufficient to justify the conclusion that the mortgagee agreed that he would pay these items as a part of the consideration for the note and mortgage, and that the amount of these items should draw interest at the rate of twelve per cent per annum until the first coupon note became due six months thereafter. As stated above, the mortgage provides that,

"Should the mortgagors fail to keep any of the foregoing covenants, then the mortgagee may at his option carry out the same, and all expenditures therefor shall draw interest until repaid at the rate of twelve per cent per annum."

Instead of contradicting the terms of the mortgage, we think it is plain that this was not only a part consideration

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for the note and mortgage, but that the clause last quoted authorized the mortgagee at that time to exercise the option of paying these items. If he agreed to do so as a part of the consideration, he could not, before the date the first coupon became due, claim that the mortgagors had violated any of the terms of the mortgage or of the note by not paying these items.

We are satisfied, therefore, that, at the time the mortgage foreclosure suit was instituted, the debt was not due and the mortgagee was not authorized to declare the whole debt due, or any part of it. This being true, the court should have dismissed the action.

The judgment of the trial court is therefore reversed and the cause dismissed.

Crow, MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 12199. Department Two. January 16, 1915.]

LILLY ZELLERS *et al.*, Respondents, v. THE CITY OF
BELLINGHAM, Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—CONSTRUCTION WORK—INJURY TO PEDESTRIAN—NEGLIGENCE—KNOWLEDGE OF CITY—ASSUMPTION OF RISKS. A city is not liable for injuries sustained by a pedestrian in stepping across a cable necessarily used by the city in street construction work, of which plaintiff had notice, and who was tripped by the tightening of the cable on starting up the donkey engine, unless the city or some city agent had notice, or in the exercise of ordinary care, must have had notice that the plaintiff was about to step over the cable at the time the donkey engine was started; notwithstanding that the street was not closed to traffic, as the cable was itself notice of danger of which pedestrians assumed the risk when attempting to cross without any notice to the city.

SAME—INJURY TO PEDESTRIANS—NEGLIGENCE—QUESTION FOR JURY. In such a case, the negligence of the city is a question for the jury, where plaintiff testified that the cable was lying loose upon the highway, and was suddenly raised as she was in the act of stepping over

¹Reported in 145 Pac. 613.

it, while the evidence of the defendant was to the effect that the cable was taut, and after watching the work while the cable was in this position, plaintiff attempted to step over it and caught the heel of her shoe on the cable and fell, and the city employees did not see her until she had fallen.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 6, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by pedestrians through street construction work. Reversed.

Dan F. North and Kellogg & Thompson, for appellant.

Thos. R. Waters and Wm. J. Biggar, for respondents.

MOUNT, J.—Action for damages on account of personal injuries. The case was tried to the court with a jury on issues made by the pleadings. The jury returned a verdict in favor of the plaintiffs for \$2,500. The defendant has appealed.

It appears that the city of Bellingham was improving Central avenue, one of the principal streets in the city. This avenue runs north and south. The east side of the avenue, thirty feet in width, had been improved by piling and capping, upon which capping planking had been laid. The west side was being improved in the same manner. The street was being built upon tide lands and necessitated piling, capping, and planking to be laid thereon in order to be improved. The contractor for the city used a pile driver in doing the work. This pile driver was built upon a framework upon which was also situated a donkey engine which operated the pile driver, and which was used for the purpose of moving the pile driver.

The easterly side of the street, which had been planked to the width of about thirty feet, was being used by pedestrians. There were no barricades to prevent pedestrians from using the finished portion of the street. In doing the work, it was necessary to move the pile driver from place to place as the

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work progressed. On March 1, 1913, a cable was carried from the pile driver to the east side of the street across the planked portion thereof, and fastened to a telephone pole for the purpose of moving the pile driver.

The testimony on behalf of the plaintiffs tended to show that they were upon the street on the day named looking at the work which was being done. They had gone a little distance away to where a dredger was making a certain fill. They then walked up to where the pile driver was at work. They watched the pile driver for a few minutes. They were standing near the cable which was attached to the telephone pole for the purpose of moving the pile driver. After standing for a few minutes, Mrs. Zellers, seeing that the cable was lying upon the street, spoke to her husband saying that they could then cross the cable, or words to that effect. She testified that, as she was in the act of stepping over the cable, which at that time was lying upon the planking of the street, the engine of the pile driver was suddenly started, the cable was raised, and her foot was caught as she was in the act of stepping over the cable, and she was thrown upon the roadway and severely injured. Others of her witnesses testified to the same effect.

This statement of the occurrence was disputed by the defendant. It contended and produced witnesses to the effect that, at the time the plaintiffs came up to the cable, it was taut; that one end of the cable was fastened to the telephone pole across the completed portion of the street, and about twenty inches above the flooring of the street; that the other end of the cable was fastened around the lower portion of the frame of the pile driver, a little below the surface of the planking to the west of the thirty-foot strip; that it extended at an angle from the pile driver to the telephone pole, and that, at the middle of the completed portion of the street, the taut cable was from eight to fifteen inches above the plank roadway; that Mrs. Zellers, while the cable was in this position, attempted to step over the cable, caught her heel

or foot on it, and fell to the floor; that the person operating the pile driver did not know Mrs. Zellers was about to cross the cable, and did not see her until after she had fallen. This was the principal issue in the case.

The court instructed the jury as follows:

"You are further instructed that if you find from the evidence by a fair preponderance thereof that at the time the plaintiff, Lillie Zellers, attempted to pass over the cable the same was lying still on the surface of the improved portion of the street or was then still and near the surface of the street and in such position that a person of reasonable prudence and caution under all the conditions and circumstances, as they then and there existed, would have considered it safe to pass over the cable, and if you further find from the evidence by a fair preponderance thereof that the plaintiff, Lillie Zellers, in the exercise of ordinary care and prudence for her own protection and safety attempted to pass over the cable, while the same was in such position, and that while so attempting to pass over the cable, the defendant, acting by and through the contractor, Sauset, his agents and employees, without warning to said plaintiff, Lillie Zellers, suddenly started up the engine of the pile driver, and drew the cable taut and thereby struck the said plaintiff with the same and raised her up and threw her on the street, and thereby injured her as alleged in the complaint, then and in such case, it would be your duty to find for the plaintiff and against the defendant city."

The court refused to give the following instruction:

"You are instructed that before you can find a verdict for the plaintiff in this case you must find, from a fair preponderance of the evidence, that the plaintiff, without any negligence on her part contributing thereto, attempted to step over the cable described in the evidence in this case, while the said cable was lying upon the planking of Central avenue, and that some agent of the defendant city of Bellingham, with knowledge that she was attempting to step over said cable, or who by the exercise of reasonable diligence should have known from some word or action of the plaintiff, that she was about to step over said cable, started or caused to be started the donkey engine attached to said cable and

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as a result said cable was raised in the air, and the plaintiff was tripped or thrown and injured by the raising of said cable."

It will be noticed that the difference between these two instructions is, that, in the one given, the jury was not told that, before a recovery could be had, it was necessary that the city, or some agent of the city, must have had notice, or in the exercise of ordinary care must have known that Mrs. Zellers was attempting or was about to step over the cable. This was clearly error. Because if the city did not know, or in the exercise of reasonable diligence was not required to know, that the plaintiff Mrs. Zellers was about to step over the cable at the time it was started, there was clearly no negligence on the part of the city. The court should have given the instruction refused, or at least should have modified the instruction given so as to contain this element of notice or knowledge.

In the case of *Pearson v. Willapa Construction Co.*, 72 Wash. 487, 130 Pac. 903, which was a case very similar to this one, we said that the plaintiff could not recover, for three reasons:

"(1) Appellant was not in a dangerous situation until he stepped over the cable; (2) there is nothing to show that respondent knew, or should have known, that appellant was about to step over the cable; (3) there is nothing to show that respondent knew, or had received any intimation, that appellant was in a dangerous position with regard to the cable when the cable was started. Hence, the basis on which that contention rests—one person negligently exposing himself to danger, the other with knowledge of such fact omitting due care for the purpose of avoiding injury—is here lacking. Appellant could plainly see what was going on; the scraper and moving cable were plainly indicative of their use; and with these facts clearly before him, he chooses his own time to act, with no intimation or knowledge on the part of respondent that he was about to so act."

And so it is in this case. If the cable was lying upon the completed roadway, as the plaintiffs' evidence tended to

show, then, in order to show negligence on the part of the agents of the city operating the cable, it was necessary to show that the agent at the time the engine was started knew, or should have known, that the plaintiff Mrs. Zellers was attempting to cross, or was about to cross the cable at that particular time. Otherwise, there was no negligence. A recovery in the case depends upon negligence of the city. It certainly was not negligence for the city to be improving the street by the means employed. It seems to be conceded that the means employed were necessary. The plaintiffs themselves, by their own testimony, knew that the cable was across the street; they knew it was being used for the purpose of moving the pile driver; and they knew that, when the engine was in motion, the cable would be raised above the surface of the street, because they had watched its operation and, a very short time before they attempted to cross, saw its position. It is true that other people, especially pedestrians, were using the street at that time, and that the street was not closed to traffic. But the mere fact that a cable lay across the street, and was being used at that particular time, was itself a warning of danger, and persons attempting to cross it were assuming the risk, unless those operating the cable knew, or in the exercise of ordinary care should have known, that persons were upon the cable, or about to step over it, or were in a dangerous place at the time it was about to be raised or put into operation. Clearly the only negligence, if there was any negligence at all, was in raising the cable when the plaintiff Mrs. Zellers was in a dangerous position. In order to show negligence, therefore, it was necessary to show that the agents of the city knew, or should have known of her position. The court entirely omitted this element from the instruction, and it was therefore erroneous.

It is argued by the respondents that the case of *Pearson v. Willapa Construction Co.*, *supra*, was in substance overruled by the later case of *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323. That was an entirely different case from

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this. In that case, the negligence consisted in maintaining a temporary sidewalk six inches lower than the cement walk, at a place where the lights cast a shadow upon the permanent walk, so that travelers upon the highway could not see the danger; and no warnings were posted near the place to prevent pedestrians from falling upon the walk. The *Pearson* case, upon which the appellant relies in this case, was not even mentioned in the later case.

The appellant insists that its motion for a directed verdict should have been sustained. But we are satisfied that, if the plaintiffs' evidence is to be believed to the exclusion of the defendant's evidence, there was a question for the jury to determine whether the accident happened in the way the plaintiffs testified, or in the way the evidence for the defendant tends to show that it happened. If the plaintiffs' version is the correct one, then the right to recover depends upon the fact whether or not the city or its agents knew, or in the exercise of reasonable caution should have known, that the plaintiff Mrs. Zellers was in the act of stepping over the cable when it was lifted from the street. And that, we think, is a question for the jury.

Other errors are assigned in the briefs to the effect that the court erred in refusing to grant a new trial. But from what we have already said, it is apparent that it is not necessary to discuss these questions, because a new trial must be granted for the error noticed.

The judgment is therefore reversed, and the cause remanded for further proceedings.

CROW, MAIN, and ELLIS, JJ., concur.

FULLERTON, J. (dissenting).—As stated in the majority opinion, the city of Bellingham, at the time the respondent received the injury for which she sues, was engaged through a contractor in improving one of its principal streets. One side of the street, the east half, had been theretofore improved by the city, had been open to public travel, and was then

in actual use by the public; many persons passing over it each day. The contractor, in the course of the work, and for the purpose of moving a pile driver, stretched a cable across the traveled way, fastening it to a telephone pole on the opposite side of the street in such a manner that, when no strain was put upon the cable, it would lie flat upon the surface of the street, but when a strain was put thereon, would raise up from such surface for a distance of some twenty inches. While the cable was in place, the respondent, who was subsequently injured thereon, passed over the street, and coming to the cable found it lying on the surface of the street. She started to cross over it, and while she was in the act of stepping over it, a strain was put thereon causing it to raise. In raising, the cable tripped her, throwing her down upon the street and caused her severe injuries. On this state of facts, the majority hold that the injured person cannot recover unless she is able to show that the city, or some agent of the city, knew, or by the exercise of ordinary diligence should have known, that she was in the act of stepping over the cable at the time it was raised; "Because," it is said, "if the city did not know, or by reasonable diligence was not required to know, that the plaintiff, Mrs. Zellers, was about to step over the cable at the time it started, there was clearly no negligence on the part of the city." With all due respect to my associates who concur in this conclusion, I think it without foundation in either reason or authority.

It is a fundamental rule, to substantiate which it would be a work of supererogation to cite authorities, that a city, when it opens a street for public use, must keep it in a reasonably safe condition for travel. It may lawfully, of course, improve a street without closing it entirely to public travel, and may lawfully, in the course of the work, place obstructions or dig trenches therein, provided it leaves the part of the way left open for travel reasonably safe for travel, and uses reasonable care and diligence to protect the public from injury by the defects. It is a general rule, and the rule in this

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jurisdiction, although perhaps not a universal rule, that the city cannot relieve itself of its primary duty in this regard by letting the work of improving a street to a contractor. This we held in *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. 844; in *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912; in *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 140, and in *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752.

It is a general rule, also, that there is a difference in respect to the notice necessary to create liability whether the defect is the result of positive misfeasance on the part of the city, or is the result of mere neglect or nonfeasance on its part—that is to say, whether the defect causing the injury was the immediate act of the city or its agent, or whether the defect arose from natural causes, as by wear from use; as, in the one case, the city is bound to take notice of the obstruction from the fact of its creation and is directly chargeable with any injury caused thereby; while, in the other, it must be shown to have had actual notice, or it must be shown that the defect existed for such a length of time as to imply notice, before it is so chargeable. See, in addition to the cases before cited, the cases of *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. 892, 61 L. R. A. 583; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; and *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 117 Am. St. 1062, 7 L. R. A. (N. S.) 424.

Concerning the facts pertinent to the inquiry, the court knows judicially that the city of Bellingham is a city of the first class; that it had a population, as shown by the United States census of 1910, of 24,577, and an estimated population, made by the same authority in the year of the accident, of 29,937. It knows from the record that the street on which the accident happened was one of the principal streets of the city; that it was left open for travel and was "traveled by hundreds of people daily;" that no guard of any kind was placed around or near the cable; that the obstruction was of such a character when not in use as to allay

suspicion or fear, and when put in use likely to become highly dangerous. The injured respondent, therefore, was not a trespasser on the street, but, on the contrary, was lawfully thereon. She had the right to assume, and to act on the assumption, that she could pass with reasonable safety over any part of the street left open for travel; and had the right to assume, and to act on the assumption, that the city would not on a sudden, and without warning, change any part of the street from a safe to a dangerous condition.

In the light of these legal principles, and in the light of the conceded facts, I am wholly unable to understand on what theory it can be held that the city was not in this instance guilty of negligence. It seems to me that the city, instead of being free from negligence if it operated the cable without notice, actual or implied, that some person was about to cross over it, was guilty of the grossest negligence if it operated it without first ascertaining that no person was about to or was in the act of crossing over it. It being the primary duty of the city, when it places a dangerous obstruction in a street which it leaves open for travel, to guard and protect the public from injury by such obstruction, the rule, as I understand it, is that it is liable to any one injured from the mere neglect of that duty, unless, of course, it can show that the injured person was himself guilty of negligence contributing to the injury. To hold with the majority in the present case is to hold that the city owed no duty to the respondent other than to refrain from wantonly injuring her. But this is the rule with relation to trespassers only, to persons wrongfully at the place of injury, and has no application to the person rightfully at the place of injury. A person rightfully at the place of injury, and pursuing his way with ordinary care, can recover for an injury caused by a defect in the street by showing mere negligence on the part of the city, he does not have to show a wanton injury. The rule of the majority places the burden on the wrong party. Instead of its being the respondent's duty to notify the city

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that she was about to cross the cable to cast liability upon the city, it was the city's duty, in order to free itself from liability, to notify her before she attempted to cross that it was about to use the cable in such a manner as to change it from a safe to a dangerous condition. The instruction given by the court, therefore, states the true rule, not the instruction the majority say should have been given.

The case relied upon by the majority to sustain their contention is *Pearson v. Willapa Construction Co.*, 72 Wash. 487, 130 Pac. 908. It is said that the case is very similar in its facts to the present case, but, with due respect to my associates, I think the only similarity is that the plaintiff was in each instance injured by a cable. The cases differ fundamentally. The case cited was rested on the principle that the injured person was a trespasser; that he was traveling where he had no right to travel; and that the operator of the cable owed him no duty to keep the way in a reasonably safe condition for travel, or any duty other than not to wantonly injure him. In the case at bar, the respondent was not a trespasser; she was traveling on a public street where she had a right to be traveling; the city owed her the duty of keeping the street in a reasonably safe condition for travel, and, in consequence, is liable if it neglected that duty to her injury, whether the negligence amounted to wantonness or not. I dissented from the case cited, but not upon the questions of law on which it was rested. It was my opinion that the evidence in the case justified submitting to the jury the question whether the way over which the injured person pursued was of such public use as to make it a *quasi* public way; contending for the rule of law that, if it was a way in common use by the public, the contractors could not place and leave unprotected dangerous agencies across it without rendering themselves liable to answer for injuries caused thereby. I did not then, and do not now, understand that the majority disagreed with me on the principles of law

involved, but that the differences arose from the discordant views taken as to the effect of the evidence.

Of the cases decided by this court which I think contrary to the conclusion reached by the majority, I will notice but a few, and first, the case the majority attempt to distinguish, namely, *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323. In that case, the appellant was injured by a defect in the street which was in the process of improvement. Stating the general rules governing in such cases, this language was used:

"Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care to keep it in a reasonably safe condition for travel. *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19. A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. *Cady v. Seattle*, *supra*. Where a city undertakes to improve a street, it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street to public travel. *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 140. It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or in the exercise of reasonable care ought to have known, its condition. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847."

Notwithstanding the statement of the majority that the case cited is an entirely different case from the case at bar, I can conceive no reason why the principle announced is not applicable. In the one case, the defect consisted in faulty construction; in the other, a cable stretched across the street. Surely, if it was necessary to put up guards and give warnings to protect from liability in the one case, it was equally so in the other.

In *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 117 Am. St. 1062, 7 L. R. A. (N. S.) 424, the plaintiff was injured

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by falling through an open trap door constructed in a sidewalk on one of the principal streets of the city. The doors were double and opened upwards, and when opened of themselves formed barriers. At the time of the accident, but one of the doors was open, and the plaintiff approached from the opposite way. It was held that the city was liable for the injury on the principle that the opening was on a prominent thoroughfare, in constant use by pedestrians, and that the city knew or ought to have known that to open the doors at any time was dangerous, and, knowing this, was guilty of negligence in not providing for proper guards when they were permitted to be opened. In *Lasityr v. Olympia*, before cited, the plaintiff was injured by falling over a wire netting stretched across a sidewalk to protect a place therein which was being repaired by the owner of the abutting property with the permission of the city. The city was held liable on similar principles. Manifestly the principle of these cases is contrary to the principle announced in the case at bar; for, if the liability of the city depends on its knowledge of the position of the person injured at the time of the immediate happening of the injury, there could have been no recovery in either of them.

But I need not pursue the authorities. They are all one way, and all against the rule announced by the majority.

Judge Mount, writing for the majority, uses this further language, namely:

"The plaintiffs themselves, by their own testimony, knew that the cable was across the street; they knew it was being used for the purpose of moving the pile driver; and they knew that, when the engine was in motion, the cable would be raised above the surface of the street, because they had watched its operation, and a very short time before they attempted to cross, saw its position. It is true that other people, especially pedestrians, were using the street at the time, and that the street was not closed to traffic. But the mere fact that a cable lay across the street and was being used at that particular time was itself a warning of danger,

and persons attempting to cross it were assuming the risk, unless those operating the cable knew, or in the exercise of ordinary care should have known, that persons were upon the cable, or about to step over it, or were in a dangerous place at the time it was about to be raised or put into operation."

But this, as I understand the rule, goes only to the contributory negligence of the respondent. It is true, of course, that, if the respondent was herself guilty of negligence, she cannot recover, even though the city were negligent; and if it is meant to be said that there was such contributory negligence as a matter of law to prevent recovery, then the case should be returned with instructions to dismiss and not for a retrial. Clearly, to say that she was guilty of contributory negligence, does not argue in favor of the principle upon which the case is reversed.

In my opinion, the city was negligent in stretching the cable across the street and operating it in a manner dangerous to the traveling public without warning, and is exempted from liability to those only of the traveling public injured thereby to whom warning was unnecessary. As I agree with the majority that the respondent cannot be charged with contributory negligence as a matter of law, I conclude that the case should be affirmed rather than reversed.

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[No. 12020. Department Two. January 19, 1915.]

CHARLES D. KING *et al.*, Respondents, v. GEORGE F. KING
et al., Appellants.¹

APPEAL—BRIEFS—REFERENCE TO RECORD—DISMISSAL. An appeal will not be dismissed for failure of the appellants' brief to refer to the statement of facts or abstract, where the respondents' brief is equally faulty.

SAME—RECORD—ABSTRACT. An abstract of the evidence need not quote the evidence, if it is stated in clear, narrative form with reasonable fullness.

SAME—RECORD—ABSTRACTS—INSTRUCTIONS. An appeal will not be dismissed for failure of the abstract to contain any of the instructions except those complained of, where the other instructions as set out in respondents' supplemental abstract did not modify or control the instructions complained of.

LANDLORD AND TENANT—EVICTION—ACTION—DEMAND. In a tenant's action for eviction and wrongful conversion of property, demand for restoration is not essential, where the landlord had served notice of forfeiture rescinding the lease, taken possession, and the evidence showed that the demand would have been futile, and there was sufficient evidence to go to the jury on the question of eviction and conversion.

SAME—EVICTION—MEASURE OF DAMAGES. In the absence of proof of special damages, the measure of damages for a wrongful eviction is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved therefor.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. An instruction, in an action for wrongful eviction that plaintiff could recover the value of the use of the premises for the period he had paid rent beyond the eviction, while abstractly erroneous, is not prejudicial to the landlord, where the proof showed that the plaintiff had paid rent for but ten days beyond the eviction, and there was no evidence of the market rental value for the unexpired term.

LANDLORD AND TENANT—EVICTION—ISSUES AND DEFENSES—INSTRUCTIONS. In an action for wrongful eviction, upon an affirmative defense and counterclaim that plaintiffs or their agent had set fire to the building to defendants' damage, it is error to give an instruction confining the evidence touching the fire to the sole office of proving the counterclaim, and inferentially eliminating the

¹Reported in 145 Pac. 971.

defense, where there was evidence clearly relevant tending to prove the affirmative defense, even if insufficient to establish the counter-claim.

SAME—EVICTION—DEFENSES—EVIDENCE—QUESTION FOR JURY. In an action for wrongful eviction, upon an issue as to whether the plaintiffs or their agent had set fire to and injured the building, the question is for the jury, where there was evidence that the fire was of incendiary origin, deliberately arranged by someone who lived in or had access to the house, and to the locked rooms containing plaintiffs' effects, and that plaintiffs and one R. were the only persons having such access.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered November 21, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful eviction and for conversion. Reversed.

George B. Holden and Englehart & Rigg, for appellants.

Snively & Bounds, for respondents.

ELLIS, J.—This is an action for damages for wrongful eviction from leased premises and for conversion of personal property.

On December 4, 1912, the defendants, by written lease, demised to the plaintiffs for a term of two years the second floor and the south room of the first floor of a two-story frame building in Toppenish, Washington, known as the "King Rooming House," at a rental of \$60 per month. At the same time, the defendants leased and agreed to sell to plaintiffs the furniture and household goods contained in the upstairs for \$900, plaintiffs paying \$450 down and agreeing to pay the balance in two equal installments as evidenced by two promissory notes for \$225 each, due in six and twelve months, respectively. By the second lease and contract of sale, the defendants agreed to execute and deliver to plaintiffs a bill of sale of the furniture upon final payment of the deferred installments and interest.

Under these leases the plaintiffs occupied the premises, and were in possession of the furniture, from December 5,

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1912, to April 13, 1913. There was a conflict of evidence as to whether the rent had been paid to April 24, or to May 4, 1913.

Early in the morning of April 13, 1913, a fire was discovered in three inner and adjoining rooms on the second floor. It was of incendiary origin. Holes had been cut in the partition walls and skylights of the rooms. The furniture had been piled on the beds. Coal oil had been poured about each of the rooms, and the bed clothes were saturated with oil. Cans of oil were standing in each room. There were two roomers, Britt and Root, in the house at the time of the fire.

On April 13, 1913, defendant George King caused the arrest of plaintiff Charles King, and the man Root, charging them with setting fire to the building. At the time of the fire, the plaintiff Charles King was visiting with a friend about three miles out of the city, having left the house in Root's charge about 6:30 o'clock on the prior afternoon. His wife was in Walla Walla, where she had gone on a visit about ten days previously. There was evidence that, previous to going, she had stated to a friend that she expected trouble and she seemed depressed. Before the fire, her husband sent her fur coat to her. One of the defendants' witnesses testified to seeing valuable silverware and linens in a trunk in one of the rooms. These articles were not in the trunk at the time of the fire. The three rooms in which the fire occurred were securely locked and the only persons permitted to enter them were the plaintiffs and the man Root. The other roomer, Britt, heard no sounds after retiring about midnight until the time of the fire. A hatchet was discovered in an old shed on the premises, having particles of plaster adhering to it of the same tint as that of the walls of the rooms. An apron belonging to the plaintiff Frances A. King was discovered in the kitchen. In a pocket of this were similar particles of plaster. She explained that they must have fallen into her pocket when she was cleaning up after certain

repairs to the plastering in the hallway. The plaintiffs carried insurance on the furniture in the amount of \$1,000. The defendants carried no insurance on either the building or its contents. Plaintiff and Root remained in custody until April 23, 1913, when, on preliminary examination, they were discharged and have been at liberty ever since.

There is no direct evidence as to the damage done to the personal property in the building, but the building itself was damaged to the extent of about \$500. The sheriff had the keys to the premises from the time of the fire until May 10, 1913, when he turned them over to the defendants. On or about April 24, 1913, the defendant George King and a deputy sheriff nailed up the doors to the building. The plaintiffs made no demand for possession nor any effort to reenter the premises or take possession of the personal property subsequent to the fire. On April 24, 1913, the defendants served notice upon the plaintiffs that, by reason of the plaintiffs' breach of the terms and conditions of the two leases and their attempt to destroy the property, they elected to terminate both leases and take possession of the real estate and personal property and forfeit all payments made by the plaintiffs as liquidated damages. Nothing further was done with the property until in August, 1913, when defendants cleaned up the debris and personally occupied the premises as a rooming house.

On September 11, 1913, the plaintiffs commenced this action, alleging that they were wrongfully evicted from the premises by defendants on April 24, 1913, and that the defendants converted the personal property included in the contract of lease and sale and certain other articles of personal property belonging to plaintiffs not so included, and claiming damages therefor. The defendants denied the allegations of the complaint, and set up, as an affirmative defense and counterclaim, that plaintiffs had attempted to destroy the property by fire and had thereby forfeited their rights under the leases and had abandoned the property, and prayed dismissal

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of the plaintiffs' action and judgment for \$500, because of damages to the building by fire. At the close of the evidence, both parties moved for a directed verdict in their favor, respectively. Both motions were overruled. The jury returned a verdict in favor of the plaintiffs for \$750. The court overruled defendants' motions for judgment *non obstante* and for a new trial. The defendants appeal.

The respondents have moved to dismiss this appeal on the grounds: (1) that all references in the appellants' brief are to the statement of facts and not to the abstract; (2) that the abstract does not refer to the pages of the statement of facts where the particular evidence is to be found; (3) that the abstract is a statement of conclusions rather than a statement of what the evidence actually was; (4) that the abstract does not contain any of the instructions except those upon which claims of error are predicated.

As to the first and second grounds, the respondents are equally derelict with the appellants. Their brief contains no reference to either abstract. Their supplemental abstract contains no reference to the statement of facts. We would not be justified in punishing the appellants alone for a fault shared equally by the respondents.

The third ground is not well taken. The appellants' abstract, it is true, does not quote the evidence, but states it in a clear, narrative form with reasonable fullness.

As to the fourth ground, it is true the abstract contains only those instructions upon which claims of error are predicated, but an examination of all the instructions as set out in respondents' supplemental abstract convinces us that the instructions complained of are in no manner modified or controlled by other instructions. The motion to dismiss is denied.

On the merits, the appellants have advanced many claims of error. They may be grouped for convenient discussion as follows: (1) that the evidence was insufficient to sustain the verdict; (2) that the court erred in instructing as to the

measure of damages for the eviction; (8) that the court erred in withdrawing from the jury the appellants' affirmative defense.

(1) It is claimed that the evidence was insufficient to sustain the verdict in that it showed no eviction from the leasehold nor any conversion of the personalty by the appellants, but on the contrary showed an abandonment by the respondents. The argument in support of these claims is based mainly upon the fact that respondents made no demand for a restoration of possession. We think, however, that the fact that appellants' notice, claiming a forfeiture of the lease and rescinding the sale of the personalty, was served upon the respondent Charles King very soon after his discharge from arrest sufficiently explains respondents' failure to make demand. There was also much other evidence tending to show that any demand for possession of either the realty or the personalty would have been futile. There was ample evidence to take the questions of eviction and conversion to the jury. *Hyman v. Jockey Club etc. Co.*, 9 Colo. App. 299, 48 Pac. 671; *Skally v. Shute*, 132 Mass. 367; 2 Tiffany, Landlord and Tenant, p. 1335.

(2) The court's instruction on the measure of damages was to the effect that, if the jury found an eviction and that the respondents had paid no rent for any time beyond the eviction, they could recover only nominal damages for the eviction, but that if the jury found that the respondents had paid rent for any time beyond the eviction, they would be entitled to recover the value of the use of the premises for such period subsequent to the eviction for which they had paid rent. Abstractly this instruction was erroneous. In the absence of pleading and proof of special damages, and there was neither in this case, the true measure of a lessee's damages for total breach of a lease is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved for such unexpired term. *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260,

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118 Pac. 680, Ann. Cas. 1912 C. 1050, 35 L. R. A. (N. S.) 426; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85; *Goldstein v. Asen*, 91 N. Y. Supp. 783; *Rhodes v. Baird*, 16 Ohio St. 573; *Favar v. Riverview Park*, 144 Ill. App. 86; *Green v. Williams*, 45 Ill. 206; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Tyson v. Chestnut*, 118 Ala. 387, 24 South. 73. In this case there is no proof of the market rental value of the unexpired term. There is proof, however, tending to show that the tenant had paid rent to May 4, 1913, that is, for ten days beyond the time of eviction, if there was an eviction. The instruction, though abstractly erroneous, was therefore not prejudicial.

(3) Touching the affirmative defense and counterclaim, the court gave the following instruction:

"The defendants also, by way of counterclaim, allege that one James Root, as agent for the plaintiffs, fired the said building whereby it was partly burned to their damages in the sum of five hundred dollars. I instruct you that there is no evidence to warrant a finding by the jury either that Root fired the building or that he was by the plaintiffs appointed as their agent to fire it, and therefore, I instruct you that you must not award defendants anything on their said counterclaim."

This instruction is erroneous in two vital particulars. In the first place, it confines the evidence touching the fire to the sole office of proving the counterclaim, and inferentially eliminates it as a defense. It is clearly relevant as tending to prove an affirmative defense, even if insufficient to establish the damages set up as a counterclaim. In the second place, it takes from the jury a question of fact touching which there is competent evidence upon which the minds of reasonable men might well reach different conclusions.

We have set out the salient facts developed by the evidence touching the character and origin of the fire and the whereabouts and actions of the respondents at the time of its occurrence. We shall not again review the evidence nor com-

ment upon it further than to say that it was sufficient, if credited by the jury, to sustain a finding that the fire was of incendiary origin and was deliberately arranged for by some one who lived in or had access, not only to the house, but to the three inner rooms where the fire originated, which it appears were always kept locked and were securely locked on the night of the conflagration. It clearly appears that the respondents and the man Root were the only persons who had access to these rooms. This is not a criminal action. The quantum of proof required in such cases was not necessary. The appellants were not compelled to produce proof beyond a reasonable doubt that the respondents caused the fire, but only to prove that fact by a fair preponderance of the evidence. The credibility and weight of the evidence was for the jury to determine. In the nature of the case, the appellants were compelled to rely upon circumstantial evidence to prove their affirmative defense and counterclaim. The circumstances here presented were, we think, amply sufficient to take this defense to the jury. They were certainly no less conclusive than those found in *Bruff v. Northwestern Mut. Fire Ass'n*, 59 Wash. 125, 109 Pac. 280, Ann. Cas. 1912 A. 1138, a case in which similar circumstances were held sufficient to take the case to the jury. In that case we said:

"The circumstances shown strongly indicate that the house had been deliberately and purposely prepared for a sudden, destructive, and well-timed conflagration. Respondent held separate insurance policies on the house and its contents, and was the only person in a position to recover for losses resulting from the fire. There was sufficient evidence, if accepted and credited by the jury, to sustain them in finding that the fire was of incendiary origin, and that some one who had access to and was familiar with the premises had deliberately arranged the house and its contents for destruction by fire. The respondent was the only person who lived in, or had constant access to, the house. He was there early in the evening, and left the building securely fastened. There was no evi-

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dence of any breaking prior to the arrival of the firemen. They found everything intact and well secured."

The parallel with the case here is too plain to require comment. We are clear that both the affirmative defense and counterclaim should have been submitted to the jury upon proper instructions.

Reversed and remanded for a new trial.

MAIN, MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 11368. Department One. January 22, 1915.]

JOSEPH J. ROSE, *Respondent*, v. LAURA FLETCHER *et al.*,
Appellants.¹

BOUNDARIES — AGREED BOUNDARY LINES — ESTOPPEL. Where adjoining landowners hired a surveyor to establish the line between them and accepted the survey, each building one-half of the line fence, and farmed their lands and made conveyances with reference to the fence as the true boundary for a period of twenty years, they are estopped to question the line upon its being found by a new survey that the first survey was erroneous.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered December 31, 1912, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

Roy R. Cahill and A. F. Appleton, for appellants.

R. M. Sturdevant and Hardy E. Hamm, for respondent.

CHADWICK, J.—This action is brought to quiet title to a strip of land lying along the boundary line between the farms of the plaintiff and the defendants. The disputed tract is shown by the plat which we have had prepared.

¹Reported in 145 Pac. 989.

WEST

<p>Originally 3</p> <p>135" 127" 119" 117"</p>	<p>Rose now 2</p> <p>171"</p>	<p>Fletcher 1</p> <p>219"</p>	<p>364" A</p>
<p>Originally 4</p>	<p>Fletcher 5</p>	<p>now Rose 6</p>	<p>0</p>

EAST

The land on the east was originally owned by the Fletchers, and that on the west was originally owned by Rose and his then wife, now divorced. In the year 1892, Rose purchased the lands owned by Fletcher, and shortly thereafter he removed the fence which had theretofore divided the two holdings, and cultivated the two tracts as one farm. The land had been cultivated by the respective owners up to the line fence and the furrows had distinctly marked a fence row upon the ground. In 1899, Rose and his then wife made a settlement of their property rights. Mrs. Rose took all of the west half of this land, describing it by political subdivisions. Rose took all of the east half describing it in a like way. In 1901, Mrs. Rose sold and conveyed all of the west half of the original tract to Fletcher. Shortly thereafter, 1902, Rose and Fletcher agreed to rebuild the fence on the old line. A fence was accordingly constructed jointly by Rose and Fletcher and the owners cultivated their land with reference thereto for about nine years, when defendant Frank Fletcher had a surveyor run the dividing line. He found it to be 364 inches out of the way at the north and about 130 inches at the south, the disputed tract measuring 1.46 acres. We have neglected to say that, in the year 1889, Rose and Fletcher had

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employed a surveyor to locate the line between their respective holdings. Both parties were present and assisted in the survey and immediately thereafter built the first fence, each one building one-half thereof.

The court found that, at the time Rose conveyed to his former wife, they mutually agreed upon the line as marked by the fence row, and that when Rose conveyed to the Fletchers, the fence row as then located was accepted and recognized by both parties as the true line. It also appears by competent evidence that the fence as it now is, is on the exact line of the original fence. From all the facts, the court found that what is called in the record the first or Livengood survey defines the true boundary line, and so decreed. Defendants have appealed. They rely upon a rule stated in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, that if parties fix a boundary line under a mistaken belief that it is the true line with no intention to claim or relinquish anything beyond the true line, they are not bound by the mistaken line although marked by a fence, but must conform to the correct boundary when it is ascertained. *Kincaid v. Dormey*, 47 Mo. 337; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. 135.

The case does not fall within that rule for clearly the owners of the lands involved for more than twenty years acted upon the boundary as originally surveyed. They farmed their land and made conveyances with reference thereto. If, in such cases, boundaries that have been defined in good faith and acted upon and improvements made with reference thereto are to give way whenever another surveyor comes along and fixes a different line, there would be no security in surveys at all. Although surveying is theoretically an exact science, it is well known that there is often a great difference in the work of surveyors when laid out on the ground, this because of inaccurate readings or the negligence or incompetence of many engineers. We had occasion to note this fact in the case of *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084. The logic of appellants' position is that the survey

relied on by them is the true survey because it is the last in time. Obviously no such conclusion follows; but, if it did, they are in no better position. This case falls within the doctrine of agreed boundaries. The rule announced in *Turner v. Creech*, *supra*, and *Windsor v. Sarsfield*, 66 Wash. 576, 119 Pac. 1112, seems to us to be controlling. The doctrine of these cases is amply sustained by the authorities, the persuasive principle being stated in *Jackson v. Van Corlaer*, 11 Johns. (N. Y.) 123:

"After they [the parties] have deliberately settled a boundary line between them, it would give too much encouragement to the spirit of litigation, to look beyond such settlement, and break up the lines so established."

See, also, *Payne v. McBride*, 96 Ark. 168, 181 S. W. 463, Ann. Cas. 1912 B. 661; *Jones v. Pashby*, 67 Mich. 459, 35 N. W. 152, 11 Am. St. 589; *Loustalot v. McKeel*, 157 Cal. 634, 108 Pac. 707; *Blair v. Smith*, 16 Mo. 273; *Smith v. Hamilton*, 20 Mich. 433, 4 Am. Rep. 398.

In the *Jones* case, it is said:

"Where parties by mutual agreement, and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession."

In the *Loustalot* case, upon a somewhat similar state of facts, the court held that, when adjoining owners entered into an agreement fixing a dividing line, and both had knowledge of all the facts and no deception or fraud was practiced by either, that,

"It is entirely immaterial whether the parties were right or wrong in believing that the true line was exactly where it should be as they established it. They were certainly in doubt as to where it should run and adjusted the matter by making a practical location of the line where they thought it ought to be, and having acquiesced in it as so established

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and having occupied their lands under the location for almost seven years, a longer period than prescribed by the statute of limitations to bar a right of entry—the line they established is conclusively determined to be the true divisional line. Courts have always looked with favor on the settlement of questions of this character by the parties in interest themselves, and when it appears that an agreement adjusting a disputed boundary line has been fairly and definitely made between them, and they have occupied their lands accordingly for a period longer than the statutory period of limitations, such agreement is conclusive, no matter whether they were mistaken or not in their belief that they were locating it along the true line. It is quite obvious that if the fact merely that the parties were mistaken as to where the true line lay could invalidate their agreement, there never could be any stability attached to such an agreement unless the line agreed on was in truth the exact line. The policy of the law, however, is to give stability to such an agreement as a method adopted in good faith by the parties themselves to settle the controversy, and because it is the most satisfactory way whereby a true boundary line may be determined, and tends to prevent litigation.”

In the *Blair* case:

“We consider this case thus: two owners of contiguous lots or tracts of land, each having his deed for his lot or tract, agree with each other, ‘we fix this mark on the earth’s surface as the line called for in my deed—this mark as the line called for in your deed; here is the line between us. My land, mentioned in my deed, comes up to this mark, or this fence, or this wall, on this side, and your land comes to the same, on that side.’ They use and possess and occupy their respective lots to this mark. Now, this use and occupancy, without disturbance, for a time long enough for men to show that they know the boundary between their lands, shall be considered binding and conclusive as to such boundary, as well as of such understanding or agreement between them. They shall not, after a lapse of years, longer or shorter, as the circumstances may tend to show their agreement or settlement, or the fixing of their common boundary, be permitted afterwards to dispute it. Such boundary, thus agreed upon, shall be considered the true one; and each one considered as

the owner of the land mentioned in his deed thus marked out to that boundary between them."

While, in the case at bar, it cannot be said that there was an open dispute, there was such uncertainty as to warrant the calling of a surveyor who fixed a line that was mutually satisfactory to the parties in interest; so that, in principle, there is no difference in the cases. An agreed boundary that has been good for twenty years ought, in the absence of some controlling equity, to be good forever.

We find no error. The judgment is affirmed.

Crow, ELLIS, and MAIN, JJ., concur.

[No. 12487. Department One. January 25, 1915.]

EZRA M. MEEKER, *Executor etc., Respondent*, v. ROBERT W. WADDLE *et al., Appellants*.¹

APPEAL—RECORD—EXCEPTIONS—TIME FOR TAKING. Under Rem. & Bal. Code, § 383, exceptions to findings of fact, in order to secure a review of the evidence, must be taken within five days after the findings are filed or notice given, or if notice is not given, then within five days after acquiring notice of the decision in any way.

APPEAL—RECORD—STATEMENT OF FACTS—FAILURE TO EXCEPT TO FINDINGS. Failure to except to findings of fact does not preclude all review on appeal or require the statement to be stricken, where the sufficiency of the complaint and of the plaintiff's evidence to support any decree in favor of the plaintiff was raised by demurrer to the complaint and motion for nonsuit, and the record contains the pleadings and all the evidence.

EXECUTORS AND ADMINISTRATORS — DISTRIBUTION — DECREE — CONCLUSIVENESS. A decree of final distribution in probate, after due notice and hearing, is of the same force as a judgment in any court of equal solemnity, and cannot be attacked or annulled in any collateral proceeding, except for fraud.

SAME—DISTRIBUTION—DECREE. A decree of final distribution including the wife's separate estate as community property cannot be set aside for fraud in procuring it, where it merely appears that the

¹Reported in 145 Pac. 967.

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decree was obtained by falsely representing that the property was all community property, and that the surviving husband made a statement that the probate was for the purpose of shutting out heirs; since a decree cannot be vacated on the mere ground that it was based upon perjured testimony.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 22, 1914, upon findings in favor of the defendants, in an action to set aside a decree of distribution. Reversed.

Forney & Ponder and *B. H. Rhodes*, for appellants.

Dysart & Ellsbury, *C. D. Cunningham*, and *J. H. Templeton*, for respondent.

HOLCOMB, J.—Plaintiff brought this action to set aside a decree of distribution and to recover an interest which he claims in certain property as successor in interest to, and heir at law of, Abbie Waddle, the deceased wife of Robert W. Waddle; basing his claim on the supposition that the assets of her estate were separate and not community, whereas distribution thereof was made by the superior court, sitting in probate, as community property.

The respondent first moves the court to strike the appellants' statement of facts and abstract of record based thereon, and to refuse to consider, for any purpose on this appeal, the evidence embodied in said statement of facts and abstract of record based thereon, for the reason and because no exceptions were taken or reserved or entered to the findings of fact embodied in the decree. It appears from the transcript that no formal findings of fact and conclusions of law were made by the trial court. A simple decree, reciting the facts, was entered by the court. No exceptions to the findings were either noted by the court or filed in writing within five days after the entry of said decree, as required by Rem. & Bal. Code, § 383 (P. C. 81 § 673). It appears that the decision or decree was signed subsequently to the hearing of the case, the hearing being completed on or about April 23, 1914, and

the judgment being signed on June 22, 1914. It does not appear whether counsel for appellants were present when the judgment was signed and had notice thereof or not. They evidently had some notice thereof, however, for they gave notice of appeal from the judgment on August 25, 1914.

It has been held by this court that, where exceptions to the findings of fact and conclusions of law are not taken within five days after their filing, they are insufficient to secure a review of the evidence upon which they are based in the appellate court. *National Bank of Commerce of Seattle v. Seattle Pickle & Vinegar Works*, 15 Wash. 126, 45 Pac. 731. Under this section, written exceptions to findings must be filed within five days after the notice of the decision. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *Irwin v. Olympia Water Works*, 12 Wash. 112, 40 Pac. 637; *Ballard v. First Nat. Bank*, 13 Wash. 670, 43 Pac. 938. But when notice of the filing of the findings is not served, exceptions may be taken within five days after acquiring notice in any way. *Irwin v. Olympia Water Works*, *supra*; *Fisher v. Kirschberg*, 17 Wash. 290, 49 Pac. 488; *Mann v. Provident Life & Trust Co.*, 42 Wash. 581, 85 Pac. 56; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399.

It does not follow, however, that respondent's motion to strike the entire statement of facts and abstract of the record should be granted. The sufficiency of the complaint to support any decree in respondent's favor was raised by demurrers by the appellants, and the sufficiency of the evidence in support of respondent's complaint was raised by appellants by a motion for nonsuit at the conclusion of respondent's evidence; to the adverse ruling upon each of which, appellants' exceptions were duly noted. So much of the statement of facts, therefore, as shows the testimony up to appellants' motion for nonsuit is properly in the record and has been properly certified, together with all the other facts. The abstract contains the pleadings and the judgment and a synopsis of the facts above alluded to. It being proper and

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necessary, therefore, to consider said portions of the record, the same will not be stricken, and the motion of respondent will be denied. We will approach the case, therefore, with a view, first, of determining whether or not the complaint stated a cause of action against the appellants, and second, whether or not the facts produced at the trial by respondent entitled him to any recovery.

The complaint alleged, among other things:

"That, on the 2d day of December, 1918, the last will and testament of Eliza J. Meeker, deceased, was duly admitted to probate in the superior court for King county, Washington, and that on said date the plaintiff herein was duly appointed and qualified as the executor of the last will and testament of said Eliza J. Meeker and ever since said date has been and now is the duly appointed, qualified, and acting executor of the last will and testament of Eliza J. Meeker, deceased, and that he is sole devisee thereunder.

"That on or about the 15th day of May, 1909, one Abbie Waddle died in Lewis county, Washington, leaving a large amount of real property and leaving surviving her Eliza J. Meeker, now deceased, and Robert W. Waddle, her husband, as her heirs at law and the only persons who were entitled to any share in said Abbie Waddle's estate.

"That thereafter and on or about the 1st day of June, 1909, the said Robert W. Waddle, defendant herein, filed a petition in the superior court of Lewis county, Washington, in probate, setting forth the fact that said Abbie Waddle died in Lewis county, Washington, on or about the 15th day of May, 1909, and stated under oath in said petition that said Robert W. Waddle was the widower of said Abbie Waddle, and that all of the property of which said Abbie Waddle died seized was community property, and that the same, upon the said Abbie Waddle's death, became the property absolutely of said Robert W. Waddle.

"That the said Robert W. Waddle was on or about June 14, 1909, appointed as the administrator of the estate of said Abbie Waddle, deceased, and that, on or about the 23d day of September, 1910, the said defendant Robert W. Waddle, as such administrator, filed in the office of the clerk of said court a purported final account in said estate, and also made application for an order of distribution therein, distributing

the entire estate left by the said Abbie Waddle to the defendant Robert W. Waddle as his sole and separate estate; that in said final report and application for distribution the said Robert W. Waddle falsely and fraudulently represented to the court that said Abbie Waddle had died without leaving any heirs other than the defendant Robert W. Waddle, her surviving husband, and also falsely and fraudulently represented to the court that all of the property of which the said Abbie Waddle was seized at the time of her death was the community property of the said Abbie Waddle and the defendant Robert W. Waddle; that said final report and application for order of distribution came on for hearing in said court on the 2d day of November, 1910, and that on the false and fraudulent showing and testimony produced by the said defendant Robert W. Waddle, the said court on said date entered an order approving said final account and distributed all of the assets of which the said Abbie Waddle died seized to the said defendant Robert W. Waddle, to the exclusion of all other persons or heirs of said Abbie Waddle, said proceeding being in the superior court of Lewis county, Washington, entitled 'In the Matter of the Estate of Abbie Waddle, Deceased,' numbered 1072 in probate.

"That the defendant Robert W. Waddle and Abbie Waddle were married some time prior to the year 1894, the exact date being unknown to the plaintiff; that at said time Abbie Waddle, whose maiden name was Abbie Sumner, owned a farm situated near Tenino, Thurston county, Washington, which was her own separate and individual property; that thereafter, to wit, after said marriage, said Abbie Waddle, formerly Abbie Sumner, sold said property for the sum of \$9,700, and immediately thereafter invested the same money derived from the sale of said farm in certain described property, to wit: [describing the same] which said property together with any other property of which said Abbie Waddle died seized, was her sole and separate property and estate and in no wise community property.

"That said property was distributed to the said defendant Robert W. Waddle by reason of his false and fraudulent representations, made to the court, and that the same was illegally and fraudulently obtained; that in truth and in fact said property should have been distributed as the separate property of the said Abbie Waddle, and the same would have

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been so distributed had not the said Robert W. Waddle falsely and fraudulently withheld from the court the true facts in regard to the ownership of said property by the said Abbie Waddle in her separate rights; that the said Eliza J. Meeker was the only heir at law of the said Abbie Waddle, said Abbie Waddle leaving surviving her no father or mother, or sister or brother or child or children other than the said Eliza J. Meeker who was her sister; that said Robert W. Waddle was only entitled to one-half of said property and that the other one-half interest in and to said property was and is the property of the estate of Eliza J. Meeker, deceased; that this plaintiff has only within the last year discovered that the said defendant Robert W. Waddle had by the aforesaid false and fraudulent representations obtained a decree of distribution distributing the entire estate of said Abbie Waddle to himself and that the estate of Eliza J. Meeker had an interest therein; that said decree of distribution would not have been made except for the false and fraudulent representations of the said Robert W. Waddle and except for the fraud perpetrated by said Waddle upon said court in withholding from the court the truth as to the ownership of said property, he, the said defendant, Robert W. Waddle, at all times knowing well that said property was the separate property of said Abbie Waddle, deceased.

"That plaintiff has been informed and alleges the facts to be that the said defendants have sold and transferred the following portions of said property [describing the same] and received the sum of \$6,200 for said last above described portions of said property, one-half of which said property or the proceeds thereof was and is the property of the estate of Eliza J. Meeker, deceased.

"That the defendants Robert W. Waddle and Estella J. Waddle, now are husband and wife, and that the said Estella J. Waddle has and is asserting an interest therein adverse to plaintiff.

"Wherefore plaintiff prays that the decree of distribution to plaintiff entered in said estate of Abbie Waddle on or about November 2, 1910, in this court, be set aside and held for naught, and that plaintiff have judgment for an undivided one-half interest in and to said property of said estate or the proceeds thereof," etc.

The appellants demurred separately as to any cause of action attempted to be set out by the respondent in any capacity, either as executor or as devisee under the will of Eliza J. Meeker, on the ground, among others, that the action was barred by the statute of limitations, and that the facts stated were insufficient to constitute a cause of action. The demurrers were overruled and exception noted.

Upon the assumption that, upon going to trial, any defects or omissions in the complaint which might be cured by amendment are deemed amended to conform to the proofs, we will next notice the evidence introduced in behalf of respondent in support of his complaint. The files in probate in the estate of Abbie Waddle, deceased, in the said superior court, were admitted in evidence, whereby it appears that Abbie Waddle died in May, 1909, and the appellant immediately administered upon her estate, being appointed administrator June 14, 1909. Both the petition and inventory exhibit the land in controversy as community property. On November 2, 1910, a decree of distribution was entered, after due notice and hearing, awarding all of the property to the appellant Robert W. Waddle as community property. No exceptions were taken by any relative or heir of deceased. Respondent knew of the death of Abbie Waddle within a day or two thereafter, but took no steps to assert his interest in her estate, and paid no attention to the administration thereof. Respondent testified that he first heard of the administration in the latter part of 1912 or early in 1913. Respondent's own wife had died on October 9, 1909. This action was brought December 10, 1913. The relief demanded is to set aside the decree of distribution entered November 2, 1910, in the probate proceedings, based upon the allegations that the decree was procured to be made and entered by means of false and fraudulent representations of appellant Waddle.

There is nothing in the testimony in support of respondent's complaint that shows whether or not the appellant

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Waddle testified at the hearing on the final account and petition for distribution of the estate of Abbie Waddle. There is some testimony to the effect that Mr. Waddle stated to a neighbor that he was going to have Mrs. Waddle's estate probated; that afterwards he said he had the same probated in order to shut out some heirs, and that later he said it was the Meeker heirs he was going to shut out. The muniments of title to various tracts of land as shown by various deeds, and of the sale of the land mentioned in the complaint as having been sold by the defendants after being distributed to them, were produced in evidence. Appellant also testified in behalf of respondent that Abbie Waddle was his wife; that she died May 29, 1909; that they were married on July 6, 1892; that they lived north of Centralia, and before that, near Bucoda, in Thurston county; that they sold the property in Thurston county for \$9,700.

It has been repeatedly held by this court that a decree of distribution by the superior court in probate, made after due notice and hearing, is entitled to the same weight as a judgment in any court or proceeding, is of equal solemnity, and cannot be attacked or annulled in any collateral proceeding, except for fraud. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990; *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492; *Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647; *Bayer v. Bayer*, ante p. 430, 145 Pac. 433; *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100. Unless, therefore, the decree of distribution in the Waddle estate, by the superior court of Lewis county, sitting in probate, can be set aside on the ground that it was fraudulently obtained, it is invulnerable to such an attack as this.

The only ground of fraud alleged or attempted to be proven by the respondent was that the appellant Robert W. Waddle falsely represented that the land in controversy was the community property of himself and his deceased wife, whereas in truth and in fact it was separate property; and

the attempted showing of a declaration against interest on the part of Waddle that he was having the same probated in order to shut out heirs. As to the first proposition, the question of whether land acquired during the marriage of spouses is separate or community property is one which has often puzzled the courts and is often a very intricate and mixed question of law and fact. A great deal of respondent's evidence and argument in this case went to the point that the land in controversy was, in fact and in law, the separate property of the deceased Abbie Waddle, and should have been so determined by the court. That may be. It does not follow, however, that the decree of distribution must be set aside for that reason only. It presupposes that the court, at the time of the determination in the probate matter, was ill-advised either as to the law or as to the facts. Which are we now to say was the case? If he were wrongly advised as to the facts, then the case presented is merely one where the testimony upon which the decree rests was perjured. That does not avail the respondent, for the reason that decrees in a court of justice cannot be set aside on collateral attack as being fraudulently obtained upon the sole ground that they were obtained upon perjured evidence, without some other extrinsic and collateral fact entering into and constituting fraud in the transaction. To hold otherwise would be to lead ultimately to bewildering and endless uncertainty and confusion. In *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. 849, this court, per Reavis, J., said on page 486:

"Perjury is not specified in our statute as a distinctive ground for vacating a judgment. There must, at any rate, be connected with it such circumstances as will relieve the opposite party from all implication of want of diligence, and deceive him completely in the nature of the testimony."

See, also, *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Graves v. Graves*, 132 Iowa 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216, and note thereto; *United States v. Throckmor-*

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ton, 98 U. S. 61; and the case just decided by this court, *Bayer v. Bayer*, *supra*.

In the last case cited, the facts as to misrepresentation of the beneficiary of the probate proceedings were very similar to the facts in the case at bar. If decrees were to be set aside upon the mere ground that they were based upon perjured testimony, decrees might never become final, for the decree which held that a former decree was founded upon perjured testimony might itself later be attacked upon the ground that it was procured by perjured testimony, and so on *ad infinitum*. We are convinced, therefore, that there were not sufficient facts either stated in the complaint or proven at the trial by respondent to entitle respondent to recover, and that the judgment of nonsuit moved for by appellant should have been granted.

The judgment is therefore reversed, and the cause remanded with instructions to dismiss the action.

MORRIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 12342. Department One. January 25, 1915.]

H. G. RICHARDSON *et al.*, *Appellants*, v. THE CITY OF
OLYMPIA, *Respondent*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—JURISDICTION—FINDING OF NECESSITY—CONCLUSIVENESS. An assessment for the purpose of filling lowlands in cities of the second and third classes, under Rem. & Bal. Code, § 7971 *et seq.*, authorizing it whenever the city council shall deem it necessary or expedient on account of the public health, sanitation, etc., cannot be attacked as beyond the jurisdiction of the council from the fact that it was not necessary for the public health or sanitation, where the record shows that the council did determine this question of its jurisdiction by finding the necessary facts to exist; since the question of necessity is, in the first instance, a legislative question, and conclusive on collateral attack; Rem. & Bal. Code, § 7905, prohibiting the setting aside of such assessments except on the ground of fraud.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered February 2, 1914, dismissing consolidated actions to quiet title, after a trial on the merits to the court. Affirmed.

Frank C. Owings, Troy & Sturdevant, and Tucker & Hyland, for appellants.

George R. Bigelow (Peters & Powell, of counsel), for respondent.

HOLCOMB, J.—Appellants are the owners of certain property within alleged assessment districts created by the respondent city. The lands owned by the appellants Richardson were entirely covered with water at flood tide, and practically bare at low tide. A portion of the lands of appellant Owings, consisting of two lots, was in the same condition, while the remainder of the lots were above the line of ordinary high tide, but on extraordinary tides at rare intervals, this remainder was also covered by water. Respondent city,

¹Reported in 145 Pac. 963.

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purporting to act under the authority of chapter 147, page 569, Laws 1909 (Rem. & Bal. Code, § 7971 *et seq.* [P. C. 77 § 858]), created two assessment districts for the purpose of filling in these properties, together with a large amount of surrounding and contiguous land.

The city proceeded regularly to make the assessments, passed its resolutions of intention to improve, and its ordinances creating the districts, fixed the time for the hearing of protests, and gave notice of such hearing, let its contract to a dredging company, and, after the completion of the work, assessed the entire cost of the alleged improvements upon all of the lots and blocks situated in the respective districts. After this had been done, but before any of the installments of said assessment had matured, appellants brought separate suits against the city to quiet their title to, and to remove the cloud occasioned by said assessments from, their respective properties. Respondent answered the complaint, setting forth in detail the steps taken by the city to perfect its liens under said assessments. Appellants replied, denying the validity of the assessments. On stipulation of the parties, the two causes were consolidated for the purposes of trial. At the trial, respondent and appellants stipulated as to the record facts of the assessment, and appellants produced the testimony of two doctors, of long residence in Olympia and of long familiarity with the lands in question, to the effect that no unsanitary conditions existed in or about the properties of appellants prior to the fills, or in fact anywhere along the water front of the city where the fills were made, and that there had been no epidemics along the water front not common to the city as a whole. This testimony was uncontroverted. The lower court gave judgment for respondent, and directed a dismissal of both actions. Such judgment was duly entered in both actions, and each appellant gave separate notice of appeal and filed a separate cost bond on appeal. Thereafter, by stipulation between the parties, said causes were consolidated on appeal

so as to have but one transcript, one statement of facts, one set of briefs, and one oral argument.

There is no dispute as to the facts. The questions presented are purely questions of law. Appellants assign as error: (1) The court erred in entering its judgment of dismissal; (2) The court erred in not entering judgment in favor of appellants, quieting title in them as against the pretended lien of such special assessment and removing the cloud upon their titles thereby created.

Appellants concede in their brief that, "for the purpose of this appeal, the court may assume that all of the record proceedings before the city council were regular." This being so, the question before the court for determination is the jurisdiction of the council to make assessments. In both cases exactly the same questions arise. Appellants made no appearances before the city council, so that, if the council had jurisdiction, the judgment of the lower court must be affirmed.

Chapter 147, page 569, Laws 1909 (Rem. & Bal. Code, § 7971 *et seq.*), provides for the improvement of lowlands in all cities of the second and third classes in this state, "whenever the city council shall deem it necessary or expedient on account of the public health, sanitation, general welfare, or other causes." This act has been before this court for interpretation and construction on two occasions: *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

In the *Aberdeen* case, the constitutionality of the act of 1909 was attacked and was upheld in the decision, upon the ground that it was within the police power of the state to allow cities to fill lowland where unsanitary conditions exist and the same constitute a menace to the public health. In the *Olympia* case, the validity of local improvement ordinances such as the ones under consideration was upheld. The appellants contend it is clear from the reasoning in the fore-

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going cases that, if the statute attempts to confer this power upon such cities where no unsanitary conditions exist, the same is unconstitutional. They further contend that the testimony of the physicians in the instant cases, being uncontroverted, establishes beyond question the facts so testified to, and therefore that the conditions which would have authorized the council to provide for the improvements involved herein did not exist.

The statute of 1909 referred to, in § 8 makes all existing provisions of the act for the levying and collecting of assessments for public improvements applicable to the proceeding under this statute. The Laws of 1905, ch. 150, page 281 (Rem. & Bal. Code, § 7905 *et seq.*) entitled: "An act to validate assessments made, or which may be made, to pay for local improvements by an incorporated city in this state, and to prohibit the setting of such assessments aside or declaring the same invalid upon any ground other than upon the ground of fraud," is probably applicable to these proceedings. This court, construing that act in *Real Estate Inv. Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057, held that this act in effect precluded all collateral attacks upon local assessments save on the ground of fraud.

In the record put in by the respondent, it appears by the ordinance that the city did find that the facts exist with reference to that portion of the city of Olympia justifying the improvements in question. It is a well established principle that the question of the necessity of improvements in the nature of public improvements is, in the first instance, a legislative question to be determined by the legislative body, and does not become a judicial question except when the method pursued is irregular and subjects the body to judicial investigation or when the proceedings are based upon fraud. On collateral attack it will be conclusively presumed that the city council found the existence of the conditions justifying the improvement, and that such findings were cor-

rect. *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241.

The contention of appellants here is, not that the city of Olympia did not have power to fill these tide lands as a sanitary measure, but that, having this power, the occasion which justified it did not arise, because it was not necessary or expedient from a sanitary standpoint. Whether such condition of expediency and necessity existed, however, was one of the things that the council was required to determine in the first instance. Under the act, the council had authority to determine these matters, and furthermore it was its duty so to do.

"If power exists the question whether a public improvement is necessary or expedient is considered a legislative one and is for the determination of the municipal legislative body, and the courts will not review their decision in this regard." 4 McQuillin, *Municipal Corporations*, p. 4289.

See, also, *Camden v. Mulford*, 26 N. J. L. 49.

"Courts will not inquire into the motives of legislators where they possess the power to do the act and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them." 2 McQuillin, *Municipal Corporations*, § 703.

See, also, *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647; 1 Abbott, *Municipal Corporations*, p. 283.

Finding no error, the judgments are affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

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Statement of Case.

[No. 12436. Department One. January 25, 1915.]

A. RADBURN, *Respondent*, v. FIR TREE LUMBER COMPANY,
Appellant.¹

WATERS AND WATER COURSES—OBSTRUCTION—ACTION FOR DAMAGES—INSTRUCTIONS. In an action for obstructing a stream and overflowing plaintiff's lands, damaging the crops, in which there was evidence of an abnormal rainfall at the time in question, it is error to refuse to give a requested instruction to the effect that, if the jury found that plaintiff's crops had been damaged by rain as well as by defendant's acts, the defendant would only be liable for such part of the damage as was caused by his acts.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. An erroneous instruction upon an issue as to the partial liability of defendant on the theory of concurrent causes of the damage, is not cured by an instruction upon his nonliability upon the theory of a sole cause for which defendant was not liable at all.

WATERS AND WATER COURSES—OBSTRUCTION—LIABILITY—UNPRECEDENTED EVENTS—INSTRUCTIONS. While a riparian proprietor, in backing up the waters of a stream so as to cover his own land, is not bound to anticipate unprecedented rainfalls or such as has not occurred within the memory of man, he is not entitled to an instruction to cover his nonliability in such event where the evidence tended to show that the rainfall for the month in question was greater in 1900 than in 1912, the year in question, neither of which could be said to be, as a matter of law, unprecedented or even extraordinary.

TRIAL—EXCEPTIONS—TIME OF TAKING EXCEPTIONS. The purpose of Rem. & Bal. Code, § 339, providing that a party, at any time before the hearing of a motion for new trial, may except to the instructions or any part thereof, being to allow the court to correct error at the time of passing on a motion for a new trial, exceptions to the refusal to give instructions may be taken at the same time and in the same way.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 28, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

¹Reported in 145 Pac. 632.

Frank C. Owings and Hayden, Langhorne & Metzger, for appellant.

Thomas M. Vance and Wm. W. Manier, for respondent.

CHADWICK, J.—This action was brought by respondent to recover damages from the appellant, it being alleged that the appellant, in the prosecution of its business as a sawmill proprietor, obstructed the flow of a natural water course flowing through the lands of the respondent; that the water was backed upon and over respondent's fields, damaging his crop of growing grain and hay to the extent of \$1,448. There was testimony from which the jury might conclude that appellant was responsible in some degree for the flooding of respondent's lands. It is shown that, in the month of August, 1912, there was a rainfall of 3.10 inches, which was unusual for this section of the country. Testimony was also offered and tended to show that a part, if not all, of the crop of growing grain could have been harvested, notwithstanding the flooding of the land. The case went to a jury and a verdict was returned in the sum of \$656. It is not contended that there was not evidence to sustain the verdict, but errors are assigned in that the court refused to instruct the jury,

"If you find from the evidence in this case that plaintiff's crop was damaged by rain as well as by any act of the defendant, then and in that event the defendant in this case is not liable for any damages caused to the crop by rain, and you can only allow plaintiff such an amount of damage as you find, if any, was caused by the defendant."

We think this instruction should have been given. It is the law that where a cause attributable to the one charged concurs with a natural or accidental cause, and both contribute to the injury, a party charged shall not be held to answer for more than his share of the wrong or damage done. We think it will require no citation of authority to sustain this proposition.

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Respondent contends that the following instruction was sufficient and is to the same purport and effect as the requested instruction:

"If you believe from the evidence in this case that during the month of August, 1912, there was an unprecedented rainfall on and in the section and vicinity of plaintiff's land and Thurston county and that it was by reason of such rainfall that plaintiff's crops and pasturage were damaged or destroyed, if you find they were damaged or destroyed, and not through any act of the defendant, then your verdict will be in favor of the defendant."

It will be seen, however, that the second instruction is based upon an entirely different theory from that maintained by the appellants upon the trial. The latter instruction seems to have been drawn upon the assumption that the defense was that the alleged unprecedented rainfall was the sole cause of the damage complained of. The defense of concurrent causes is entirely overlooked.

The court was requested to instruct the jury:

"I instruct you as a matter of law that, if you find from the evidence in this case that the defendant, when it diverted the water of the creek in question to the log pond and made the excavation for its log pond, used all reasonable care and caution to prevent the water of the stream in question from backing up onto the plaintiff's lands and doing injury to his crops; and if you further find from the evidence that after the defendant had completed his operations and had diverted the waters of the stream in question into the log pond so excavated by it; that the effect thereof was to cause only a slight backing up of the waters of said stream, which backing up of the waters did not extend beyond the lands owned by the defendant and onto the lands owned by the plaintiff; and if you further find that during ordinary rainfall there would be no backing up of the waters of said creek by reason of any of the operations of the defendant in diverting said stream onto the lands of the plaintiff; and if you further find from the evidence in this case that during the months of July, August and September, 1912, there was an unprecedented heavy downfall of rain, which, combined

with the operations of the defendant in diverting said stream and excavating said log pond caused the waters of said stream to back up onto the lands of the plaintiff, still the defendant would not be liable for any damages as it could not be held to have foreseen such an event."

There was no error in refusing to give this instruction. A riparian proprietor has a right to dam a stream flowing by his premises. He may back the water within his own boundary and is not bound to anticipate unprecedented storms or rainfalls. He is bound to contemplate the possibility of interference by natural agencies of an ordinary character (8 Am. & Eng. Ency. Law [2d ed.] 574), but the law does not put upon men who are engaged in the prosecution of rightful enterprises the duty of anticipating that which is unprecedented or which has not occurred within the memory of man. But the instruction cannot be sustained by reference to any issuable fact. While it is true that appellants allege, by way of answer, that the whole of southwestern Washington had been visited by an unprecedented rainstorm in the month of August, 1912, it introduced the government records running over a period of thirteen years, which show that in August, 1900, there was an even greater rainfall than in the year 1912. The government records back of the year 1899 are not shown. We cannot say, as a matter of law, that the rainfall either in 1900 or 1912, was unprecedented or even extraordinary, nor could a jury predicate a verdict upon the evidence that it was so.

We have not overlooked the contention of counsel that exceptions were not properly taken to the refusal of the court to give requested instructions. Counsel rely upon the last paragraph of Rem. & Bal. Code, § 339 (P. C. 81 § 587):

"Either party, at any time before the hearing of a motion for a new trial may except to the instructions given by the court, or any part thereof."

This was inserted as a new enactment in subd. 4 of § 1, ch. 86, Laws 1909, page 184. It is insisted that the act in terms

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refers only to exceptions to instructions given by the court and that exceptions to instructions requested and refused must be taken under the practice prevailing prior to the enactment of the law of 1909. Laws 1903, ch. 81, p. 119; Code of 1881, § 221. Under the old practice, the purpose of taking exceptions to the instructions of the court was to give an opportunity to correct error. Accordingly, exceptions were taken after the jury had retired and before the verdict was returned. Under the last enactment, exceptions may be taken at any time before the motion for a new trial is heard. The theory upon which exceptions were taken prior to the return of the verdict cannot apply to exceptions to instructions requested and refused, because the court has had its attention called to the requested instructions before the jury is instructed and has had an opportunity to decide whether they state the law and should be given as requested, or in a modified form. There is no rule of practice and no reason for a rule of practice, that would require an exception to an instruction requested and refused to be taken under the practice prevailing prior to the law of 1909, for neither under the original practice act, Code of 1881, § 221; nor in the two amendatory acts is there anything that suggests the manner of taking exception to the refusal to give requested instructions. Therefore, for the sake of orderly practice if for no other reason, it should be held that the purpose and spirit of the last act, 1909, being to give the court an opportunity to correct error at the time he passes upon the motion for a new trial (*Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202), all exceptions, whether to instructions given or to instructions refused, should be taken in the same way and considered at the same time by the trial court.

For the error assigned, the case is reversed, and remanded for a new trial.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12168. Department One. January 26, 1915.]

BROWN BROTHERS LUMBER COMPANY, *Appellant*, v. PRESTON
MILL COMPANY, *Respondent*.¹

VENDOR AND PURCHASER—CONTRACT—DELIVERY. Delivery of a contract for the sale of land is not shown by the fact that the vendor handed it to the vendee with other papers, except the executed deed, for examination, and for which the vendor was to receive certain other lands, cash, and notes, and no tender of performance was made by the vendee for months.

SAME—DELIVERY—PRESUMPTIONS—INTEREST. The *prima facie* evidence of delivery from the fact of possession of an executory contract for the sale of land is less stringent than in the case of executed contracts; and whether there was a complete delivery depends on the intention of the parties, construed according to practical business rules.

SAME—CONTRACTS—ACCEPTANCE—REASONABLE TIME—ESTOPPEL. Where a deal for the sale of timber lands required the vendee to purchase the interest of a third party in other lands to be given in exchange, notwithstanding which the vendee was notified that the deal ought to be closed within a month, and for three months the vendor constantly tried to have the deal closed, when it notified the vendee that it must be closed within one week, a reasonable time was given to the vendee to close the deal, in the absence of any explanation or excuse for the long delay; hence the vendor was not estopped from refusing to carry out the contract three weeks later when the vendee, having acquired the third party's interest, finally tendered performance.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 17, 1914, upon findings in favor of the defendant, granting specific performance, in an action to quiet title. Reversed.

Alexander & Bundy, for appellant.

Corwin S. Shank and *H. C. Belt*, for respondent.

CHADWICK, J.—The plaintiff, a Wisconsin corporation, commenced this action to quiet title. The defendant an-

¹Reported in 145 Pac. 964.

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swered, alleging facts which it thought entitled it to specific performance, and prayed for that relief. The court entered a decree granting the relief asked by the defendant. Plaintiff has appealed.

The admitted facts are these: On the 21st day of August, 1911, Charles J. Erickson and August Lovegren, with their wives, were the owners of certain land in Mason county. Erickson was the president of the respondent corporation. At the same time, the appellant owned certain timber, and easements for its removal from the land, in King county, situated near the respondent's plant, upon which it owed the sum of \$4,750 to the owners of the land on which the timber stood. The appellant was also under obligation to pay the taxes assessed against the land and timber until 1920. One R. D. Brown, who resided in Seattle, was its local agent. On August 18, 1911, Brown wired the appellant: "Preston offers eighteen, eight cash, balance five per year. Answer;" meaning that the respondent offered to pay \$18,000 for the King county timber, \$8,000 cash, balance \$5,000 per year. The offer also included, although not expressed in the telegram, the Mason county land then owned by Erickson and Lovegren. On the same day the appellant wired Brown: "Accept Preston offer, eight cash, balance five per year. Will forward papers;" and wrote Brown a letter confirming its telegram, and inclosing an abstract of the King county land, duplicate originals of contract for a deed to the respondent of the timber both of which it had executed, two notes for the signature of the respondent, and duplicate originals of deed to the respondent, one of which it had executed and acknowledged. It advised Brown: "We also think it necessary that we should have an indemnity bond . . . for at least \$5,000" to secure the payments to become due to the owner of the land. "If papers are O. K., please turn over to Preston Mill Company one copy of the contract for deed which is executed, and one copy of the deed itself which is not executed. All other papers to be re-

turned to us." By the terms of the contract, the appellant agreed to sell the timber and easements to the respondent for \$18,000, \$8,000 cash, \$5,000 payable in one year and \$5,000 payable in two years, the deferred payments to bear interest at the rate of seven per cent per annum, interest payable annually, and to be evidenced by two promissory notes to be signed by the respondent, payable to the order of the appellant at the Merchants State Bank of Rhinelander, Wisconsin. The contract further provided that the respondent should pay all taxes levied against the land and timber, beginning with the year 1911, and make all payments to become due from the appellant to the owner of the land, aggregating about \$4,750.

The appellant's agent Brown testified that, on or about September 1 he delivered to Erickson, as the president of the respondent, for examination, one copy of the contract which had been executed by the appellant, and a copy of the deed, two promissory notes for the signature of the respondent, and the appellant's letter of instructions of date August 21. He further testified that, on the 24th day of August, he learned that Lovegren had an interest in the Mason county land. He said Erickson said that it might take a month to get title from Lovegren, and that he told Erickson the appellant was "very anxious" to have the deal closed as soon as possible, and that "I did not think the negotiations ought to go over a month." On September 7, the appellant wrote Brown, inquiring "How about the Preston Mill Company deal? Is it going through this time or are they refusing to close?" On September 21 it again wrote Brown: "What if any information can you give us regarding the Preston Mill Company deal? Did they refuse to close?" On September 24, Brown wrote the appellant that he had received and forwarded the abstract of the Mason county land to have it brought to date, saying in addition: "This Preston deal has been dragging in bad shape." On October 12, Brown wrote the appellant that Erickson had not bought Lovegren's in-

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terest in the Mason county timber; that in order to close the trade, the respondent would have to pay Lovegren \$7,000 therefor; that he had had the abstract examined and found the title good, and that he had "been pushing them to come to some settlement." He further advised that Erickson had made him an offer that morning of \$28,000 cash for the timber. On October 17, the appellant wrote Brown acknowledging his letter of the 12th inst., and directing him to have the King county timber cruised. On October 20, it again wrote Brown, to the effect that it was awaiting "with considerable interest" the result of the cruise on the King county timber. On November 3, Brown wrote the appellant: "Erickson was in again today, saying he had a definite answer from Lovegren today saying he would neither buy nor sell the Mason county lands. He says that he is going down to Oregon Monday to thresh it out with him. This means a long delay and possibly legal difficulties before this deal goes through. In the meantime I expect to have the boys' cruise on it by the first of this next week." On November 13, Brown wrote the appellant, inclosing a summary of the cruise of the King county timber, stating that it ran over one hundred per cent higher than he had estimated, and that "Friday afternoon [about November 10] Mr. Erickson was in and stated that the deed was on the way to Lovegren's wife to sign; that we ought to be able to close up this week." He further advised in this letter that he intended to inform Erickson that if the deal was not closed by the 20th he would decline to close it at all. His testimony shows that, on that date, he left a note to that effect in Erickson's office, and that he advised him to the same effect verbally the next day. On November 17, the appellant wired Brown: "Estimate received. Withdraw Preston timber from market until further advice." On November 18, the appellant wrote Brown, confirming its telegram of the 17th. It further advised him: "Should the deal be closed before receiving this telegram, we of course would have to stand pat on the proposition." On

December 13, the respondent, through Erickson, its president, tendered the appellant \$8,000 in gold coin, two promissory notes executed by the respondent conformably to the contract, and a deed from Erickson and wife to the Mason county timber, and demanded that the appellant comply with the terms of the contract upon its part. Upon the same day, it signed the duplicate contract and filed it for record in King county.

Mr. Erickson admitted upon the witness stand that Brown had notified him, on or about the 14th of November, that the deal had to be closed by November 20th. He says he did not remember the precise date, but that it may have been about November 14. It appears that, about the 10th of November, Erickson received a deed from Lovegren, but that it had not been signed by Lovegren's wife. He thereupon returned it for her signature, and it was returned to him with her signature about the first of December. The Lovegrens lived in Oregon about forty miles southwest of Portland. There is nothing in the record to indicate any real cause for the delay, unless it was because Lovegren did not want to sell, or Erickson was not willing to pay him the price he demanded. Erickson admits that Brown was continually hurrying him to close the trade. He does not deny that he told Brown, about the 3d day of November, that he had received a definite answer from Lovegren, saying that he would neither buy nor sell the Mason county land. Nor does he deny that Brown told him on the 24th day of August, that the deal ought to be closed within a month. Neither does he deny that, about the 10th day of November, he told Brown that the deed was on the way to Lovegren's wife, and that "we ought to be able to close up this week."

Brown further testified that, on the 20th of November, at the request of Erickson, he went with him to the office of Erickson's attorney and that while there he, Brown, took from the office of such attorney one copy of the contract, the copy of the deed, the two notes, the abstract of title to the

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King county timber, and his letter of instructions, and that Erickson refused to deliver one copy of the contract. At the time of the trial, Brown was in possession of all the papers, except the one copy of the contract. Erickson says that he delivered the abstract of title to Brown after he made the tender on December 13. In obedience to the appellant's direction, Brown had the timber cruised, and the cruising was completed about November 10. The cruise disclosed that the land contained much more timber than the appellant had theretofore estimated.

The court found, as a fact, that Brown delivered the contract to the respondent, and concluded, as a matter of law, that the appellant was estopped from calling off the deal. There is nothing in the record to support the finding that the contract was delivered. Brown testified that he handed it, with the other papers with the exception of the executed deed, over to Erickson for examination. All the circumstances of the case support this testimony. Under the contract, the appellant was to receive, in exchange for the timber, the Mason county land valued at \$14,000, \$8,000 in cash, and two promissory notes for \$5,000 each. The respondent did not even make a tender of performance until the 13th day of December. It was then that it signed the notes and the duplicate contract and caused the contract to be recorded. The respondent did not know, at the time the papers were turned over to it, whether it could acquire the Lovegren interest in the Mason county land. It is obvious, therefore, we think, that Brown did not intend to deliver the contract.

On the question of delivery the respondent has cited *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946, and *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081. These cases announce the rule that the mere possession of an executed deed by the grantee is *prima facie* evidence of delivery, "which can be overthrown only by clear and convincing evidence."

The rule of evidence is less stringent, however, as applied to executory contracts. 13 Cyc. 564; *Hicks v. Goode*, 12 Leigh (Va.) 498; *Dietz v. Farish*, 79 N. Y. 520.

The *Dietz* case was quite similar to this. It was an action to compel a specific performance of a contract. The court said that the transaction was not an unusual one, and the court should construe the acts of the parties according to practical business rules. The same rule applies here, and by construing the acts of the parties according to practical business rules, we have no doubt that there was no delivery of the contract. Whether there was a complete delivery depends upon the intention of the parties, and this intention must, of course, be ascertained from what was said and done, and from all the known attendant circumstances. *Matson v. Johnson*, 48 Wash. 256, 98 Pac. 324, 125 Am. St. 924.

The real question in this case is one of estoppel: Is the appellant estopped upon the facts stated from refusing to carry out its contract? Mr. Erickson testified that he told Brown before he received the papers that, if the bid was not going through, he did not want to buy Lovegren's interest. This Brown does not deny. The correspondence between Brown and his principal and his oral testimony both show that he knew, as early as August 24, that Erickson would be required to acquire the Lovegren interest in order to carry out the transaction. It must not be forgotten, however, that he told Erickson that the deal ought to be closed within a month, and that Erickson told Brown on the 10th of November that he ought to be able to close the deal within a week. On the 13th day of November, Brown gave Erickson notice that the deal must be closed by the 20th. This, we think, under all the circumstances, was a reasonable time. Indeed, there is nothing in the record to indicate, as we have said, that with due diligence Erickson could not have acquired the Lovegren interest long prior to November 20. Lovegren and his wife were living within two hundred miles of the city of Seattle where both Erickson and Brown resided. Erickson

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testified that there was nothing to delay closing the deal except acquiring the Lovegren interest. He did not undertake to explain why the Lovegren interest could not have been acquired much sooner. The rule is: "If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made." *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149.

The most favorable view that can be taken for the respondent is that the appellant consented that it should have a reasonable time in which to acquire the Lovegren interest. *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634; *Miller v. Rice*, 133 Ill. 315, 24 N. E. 543. In the *Miller* case, it was said that, where time is not in express terms made of the essence of the contract, its materiality may be implied upon a variety of circumstances, such as where the subject-matter of the contract is from its nature subject to considerable and frequent variations of price, or "where the object of the contract is a commercial enterprise."

The judgment is reversed, with directions to grant the relief prayed for in the complaint.

MORRIS, C. J., CROW, and PARKER, JJ., concur.

[No. 12113. Department One. January 27, 1915.]

M. T. MALONEY, *Appellant*, v. LOUISE L. MALONEY,
Respondent.¹

DIVORCE—GROUNDS—ABANDONMENT—JUSTIFICATION. A husband is not entitled to a judgment of divorce on the ground of abandonment on evidence that he and his wife had lived separate and apart for a few years, where it appears that the wife, while objecting to a divorce, had sufficient cause in living apart from the fact that the husband had taken up with another woman whom he wished to marry, and with whom he sustained illicit relations; since the abandonment must be voluntary and without justification; nor would abandonment be shown by refusing a reconciliation which was not offered in good faith.

SAME—INABILITY TO LIVE TOGETHER. The fact that a husband and wife have hopelessly drifted apart and can no longer live together as man and wife, is not ground for granting a divorce to the husband, where the conditions were due solely to his wrongful acts.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 11, 1913, upon findings in favor of the defendant, in an action for divorce. Affirmed.

Daniel Landon and Gay & Kelleran, for appellant.

Arthur E. Griffin and Arthur R. Griffin, for respondent.

CROW, J.—This is an action for divorce. The plaintiff, M. T. Maloney, alleged, that he and the defendant, Louise L. Maloney, were married in 1882; that three children were born to the marriage, two, a son and a daughter, now of the age of majority, and the third, a son, now about sixteen years of age; that plaintiff and defendant have lived separate and apart for more than one year last past; that defendant abandoned plaintiff without cause, and that there is an incompatibility of temperament between the parties. Defendant, answering, admitted that she and plaintiff had lived apart for more than one year, but denied that she had

¹Reported in 145 Pac. 631.

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abandoned plaintiff. For affirmative answer, she alleged that, for more than three years last past, plaintiff had wrongfully abandoned her; that he had refused to provide for her; that he had refused to support her children, and that she has no property or means of support. The relief for which she prays is that the appellant be required to pay her \$75 per month for the maintenance of herself and children, and that she recover a reasonable attorney's fee and costs.

The trial court found that the defendant had not abandoned plaintiff, but that, for more than three years last past, he had wrongfully abandoned her; that he is able to support defendant and her minor child; that, at times in the past, he has done so; that, at other times, he has failed and refused to support them, and that the sum of \$40 per month is a just and reasonable sum to be allowed the defendant for the support and maintenance of herself and her minor child. Upon these findings, a judgment was entered whereby it was ordered that plaintiff's prayer for a divorce be denied, that he be ordered and directed to pay \$40 per month to defendant for the support and maintenance of herself and minor child, and that he pay the costs of the action. From this decree, the plaintiff has appealed.

Appellant makes several assignments of error, but the only contention which he presents in his brief is that the trial court should have awarded him a decree of divorce on the ground of abandonment and incompatibility. While it is true that the parties had lived separate and apart for some years prior to the commencement of this action, there is not evidence sufficient to show that respondent abandoned appellant, or that she had lived separate and apart from him wrongfully and without sufficient cause. Appellant himself admitted, when testifying, that he had become enamored of another woman; that he had taken a trip to California with her; that he had taken her to public entertainments, and that he had frequently told his wife he was in love with the other woman and wished to marry her. Respondent testified to his

admission that he had sustained illicit relations with the woman, and that his conduct in that regard was the sole occasion of trouble between appellant and herself. Respondent in open court stated that she did not want a divorce, and resisted any decree being granted to appellant. She asks only separate maintenance, which was granted by the trial court.

Appellant contends that the facts disclosed by the evidence show he was deserted by respondent, and that they cannot live together as husband and wife. To sustain an order granting a divorce on the ground of abandonment, it must appear that there has been a voluntary abandonment of one spouse by the other, without the former's consent, without justification, and without the intention of returning, and that such abandonment must continue for the period of one year. In other words, it must appear that the absence of the spouse accused of abandonment is not justified by the conduct of the other spouse. Appellant's own admissions, which are in harmony with the evidence of his wife, are sufficient to show that, if the respondent did leave him as he contends, her action in so doing was neither wrongful nor unjustifiable. She objects to a divorce. There is no act of hers which entitles him to a decree. To grant him a decree against her protest would place a premium upon his wrongdoing, and punish her.

Appellant contends that he repeatedly sought a reconciliation, which respondent refused. His argument that he is now entitled to a decree is predicated on the assumption that, if one spouse seeks a reconciliation and the other refuses, the latter is guilty of abandonment. There is no evidence that he repented of his course of conduct toward the other woman, that he ceased his improper attentions to her, or abandoned his desire to marry her. On the contrary, it would seem that his efforts for a reconciliation, if any, were made for the express purpose of supporting his contention that he had been abandoned by his wife, so that he might secure a decree for that cause. The record does not indicate good faith on his part in this regard. While the law encourages reconciliation

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and resumption of marital relations between estranged spouses, it does not enforce condonation, nor require that a wife who declines to live with a husband who has been guilty of adultery and other matrimonial offenses, shall herself be deemed guilty of abandonment. *Bovaird v. Bovaird*, 78 Kan. 315, 96 Pac. 666.

Appellant argues that he and respondent have hopelessly drifted apart; that they have been alienated from each other, and that it is impossible for them to live together as husband and wife. He cites *Spute v. Spute*, 74 Wash. 665, 134 Pac. 175, and contends that it is authority for a decree in his favor. We find no resemblance between the facts of that case and the facts before us. While it may be conceded that appellant and respondent have drifted hopelessly apart, that condition in no way is due to any act or misconduct of respondent, but is entirely due to appellant's wrongdoing, and the trial court so found. This being true, she should neither be punished nor placed in a wrong light by having a decree of divorce entered in favor of appellant and against her.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, and PARKER, JJ., concur.

[No. 12414. Department One. January 27, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD
HAYNES, *Appellant*.¹

CRIMINAL LAW—TRIAL—JOINDER OF DEFENDANTS—VERDICT—CONSISTENCY. Upon a joint information for grand larceny, evidence that one of the accused took from the person of the prosecuting witness at least \$24.70, and other evidence that he took \$34.70 and gave \$10 of it to his codefendant, warrants a verdict of guilty as to such defendant, although his codefendant was acquitted; since his guilt is not inconsistent with the innocence of his codefendant.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered July 7, 1914, upon a trial and conviction of grand larceny. Affirmed.

Jno. Mills Day, for appellant.

John F. Murphy and *Louis T. Silvain*, for respondent.

PARKER, J.—Edward Haynes and George Brenzel were jointly charged by information with the crime of larceny from the person of Frank Brooks, under Rem. & Bal. Code, § 2605 (P. C. 135 § 708), defining grand larceny. They were tried jointly before the court and a jury, resulting in a verdict of not guilty as to Brenzel and a verdict of guilty as to Haynes, upon which verdict of guilty Haynes was sentenced to imprisonment. From this judgment and sentence, he has appealed.

The evidence tended to show that Haynes committed the offense as charged, by actually taking at least \$24.70 from the person of Brooks; and also tended, but we think not so strongly, to show that the amount so taken by Haynes from the person of Brooks was \$34.70, and that immediately afterwards he gave to Brenzel, and Brenzel accepted, a ten dollar bill of the money so taken. The acceptance of this bill by Brenzel was the main fact relied upon by the prosecution to show his guilt. The jury, however, evidently arrived at the

¹Reported in 145 Pac. 634.

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Opinion Per PARKER, J.

conclusion that Haynes took from the person of Brooks only \$24.70, and did not give to Brenzel, and that Brenzel did not accept, the ten dollar bill as claimed by the prosecution. Manifestly it was upon this theory that the jury convicted Haynes and acquitted Brenzel.

Counsel for appellant, Haynes, contends that the finding of Brenzel not guilty by the jury is so inconsistent with the finding of Haynes guilty, as to render the conviction of Haynes without legal support, in view of the joint charge and the evidence tending to show joint participation in the commission of the offense. Counsel invokes the rule that: "If the acquittal of one shows the other to be innocent, the verdict is contradictory; and though in terms it pronounces those thus appearing innocent to be guilty, it will not sustain a judgment against them," as stated in 1 Bishop's New Criminal Law, § 800. This rule is applicable where only two persons are alleged to be participants in a conspiracy, and the jury find one guilty and the other innocent; or where two defendants are jointly indicted for larceny of a single article of personal property, and the jury convict one of grand larceny and the other of petit larceny, where the distinction rests alone upon the value of the stolen property. In such cases, of course, both are necessarily equally guilty or innocent. We think this doctrine is of no aid to counsel for appellant in his contention here made, for the evidence as a whole is, we think, more convincing that Haynes actually took from the person of Brooks at least \$24.70, than that he so took \$34.70 and gave \$10 thereof to Brenzel. Under such conditions, the guilt of Haynes is not necessarily inconsistent with the innocence of Brenzel.

Counsel cite and rely upon *Davis v. State*, 75 Miss. 637, 23 South. 770, 941, where two persons were indicted for a misdemeanor and the testimony was exactly alike as to both, from which the court concluded that both or neither was guilty; observing, at page 641, as follows:

"The general rule that where two are jointly indicted for the same offense, it not being in its nature a joint offense, the jury may acquit one and convict the other, or disagree as to the other is, of course, admitted. That is a mere rule of pleading and practice. They may, but when? Only when the evidence warrants it. They may believe one witness and disbelieve another; they may accept circumstances against positive testimony; where there is the slightest difference in the testimony as between the two, they weighing that testimony may make the difference. But in a case like this, where the whole testimony is that of a single witness in every particular the same against one as the other, it is not legally possible that a verdict which distinguishes is a response to the evidence."

Counsel also cites and relies upon *State v. Wilson*, 3 McCord (S. C.) 117, where there was under consideration a charge of larceny against two defendants, one of whom was found by the jury guilty of grand larceny, and the other guilty of petit larceny, the distinction between those crimes resting alone upon the value of the property taken and the evidence showing that both joined in the taking of all of the property or none. Of course, there could not be a different measure of value of the property in the hands of one from its value in the hands of the other.

Counsel for appellant does not contend that there is a want of sufficient evidence to sustain the verdict of guilty as against Haynes, apart from his contention resting upon the theory of the guilt of one being inconsistent with the innocence of the other.

We are of the opinion that the judgment against appellant Haynes must be affirmed. It is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

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[No. 11769. Department One. January 29, 1915.]

R. C. PETTET, *Respondent*, v. ELMER E. JOHNSTON *et al.*,
Appellants.¹

CONTRACTS—TERMS — EVIDENCE — ADMISSIBILITY. Where the evidence as to the terms of an oral contract is conflicting, evidence of the value of the work contracted for is admissible as circumstantial evidence bearing on the contention of the parties.

APPEAL—REVIEW—ERROR INVITED BY APPELLANT. Where appellant first objected to certain evidence as inadmissible, the objection was sustained, and respondent acquiesced in such ruling by withdrawing the question, error cannot be predicated on the rejection of similar evidence offered by the appellant over respondent's objection; as the error was invited by appellant.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 25, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Coleman, Fogarty & Anderson, for appellants.

Stiger & Dally, for respondent.

Crow, J.—Action by R. C. Pettet against Elmer E. Johnston and Jessie M. Johnston, his wife, to recover the amount alleged to be due on a contract for clearing land and for extra work. From a verdict and judgment in plaintiff's favor, the defendants have appealed.

The respondent alleged, that, on or about October 1, 1910, he entered into an oral contract with appellants, whereby he agreed to clear about eight acres of land for \$125 per acre; that he performed his contract; that he also performed extra work of the value of \$100 at appellants' request; and that, after allowing appellants all credits to which they are entitled, they were indebted to him in the sum of \$571.17, for which he asked judgment, with interest. Appellants denied

¹Reported in 145 Pac. 985.

that the tract to be cleared contained more than six and one-half acres; denied that they agreed to pay respondent \$125 per acre; denied that respondent had completed his contract; alleged that it would cost \$100 to complete it, and contended that respondent contracted to do all of the work for the agreed sum of \$500.

From this statement of the issues, it is apparent that the one question involved was whether the contract price was to be \$125 per acre, or \$500 in all. Appellants called one I. L. Todd, a competent and qualified witness, and asked him what it would be worth to clear such land as appellants. To this question, respondent's objection, on the ground that it was immaterial and irrelevant, was sustained. Thereupon appellants offered to prove by the witness that he had examined similar land in the immediate neighborhood belonging to the appellants, and that the value of clearing such land would not exceed \$80 per acre. To this offer respondent's objection was also sustained. Appellants now contend that, as a dispute arose between the parties with reference to the contract actually made and the contract price, the evidence offered should have been admitted, not for the purpose of establishing a contract, but for the purpose of furnishing circumstantial evidence as to which contention of the parties was correct. In support of this position appellants cite *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101; *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760; *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; and *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

There is no question but that this class of evidence is ordinarily competent and admissible in cases of this character for the purpose which appellants urge. In *Wheeler v. Buck & Co.*, *supra*, we said:

"In an action on a contract for work, when the testimony is conflicting as to the price agreed upon for the work, it is

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competent to show the value of such work at the time the contract was made, as tending to show what the agreed price was."

We are of the opinion, however, that appellants are not in a position to take advantage of this alleged error. The record shows that, when respondent was introducing his evidence for the purpose of showing the contract which he alleged was made, he produced one A. O. Clevisch, a competent witness, and asked the following questions:

"Q. Do you know what it is worth to clear such land as that, take it all together, as a job? A. Why, I have done such work on a job. Q. What would it be worth to clear such land? Mr. Anderson [attorney for appellants]: Objected to as immaterial. Sustained. Question withdrawn."

It will thus be noticed that the first objection to this class of evidence was made by appellants and sustained by the trial court; that, after the objection was sustained, respondent submitted to the ruling of the court and withdrew the question. The first ruling of the court, that this evidence was inadmissible, was procured by appellants themselves. If the ruling was erroneous, the error was invited by them. This being true, it is apparent that appellants are now in no position to take advantage of the error which they invited and now urge.

Appellants urged the exclusion of this evidence as error, in presenting their motion for a new trial. In passing upon the motion, the trial judge well said:

"I do not think that the defendant is in a position, after having obtained a ruling from the court that such evidence is immaterial, to now predicate error on the court's sustaining an objection to similar testimony proposed by the plaintiff."

Appellants in their brief seek to meet this suggestion by saying:

"The court appears to be of the opinion that errors can be set off against each other so long as they have occurred in the offer of testimony by the opposing parties to the suit."

If appellants had first offered to introduce this evidence and respondent had objected, and thereafter respondent had sought to introduce it, the situation of the parties would be different. But as above suggested, the ruling was first procured by the appellants themselves, and it is a well settled rule of practice that no advantage can be taken of invited error by the party who invited it. 2 Ruling Case Law, § 198.

The judgment is affirmed.

CHADWICK, MAIN, and ELLIS, JJ., concur.

[No. 11919. Department Two. January 29, 1915.]

ALEX BATTYANY *et al.*, Respondents, v. ALFRED C. McNELEY
et al., Appellants.¹

APPEAL — PARTIES ENTITLED — GUARDIAN — ADVERSE INTERESTS. Where defendant was sued individually and as guardian for minor children, whose interests were adverse to him, and a guardian *ad litem* had been appointed, on judgment against the defendant individually, he cannot appeal as general guardian for the infants.

HUSBAND AND WIFE — COMMUNITY PROPERTY — EVIDENCE — SUFFICIENCY. There is sufficient evidence to sustain findings that certain real property was community property of the plaintiff and his deceased wife, as against his claim that it was his separate property, where it appears that the original contract for the land ran to him and his wife as grantees, and that payments were made thereon from funds of the wife prior to her death, although thereafter he made final payment and took a deed in his own name.

Appeal from a judgment of the superior court for Spokane county, Jackson, J., entered May 8, 1913, upon findings in favor of the plaintiffs, in an action for equitable relief. Affirmed.

L. H. Prather (W. C. Jones, of counsel), for appellants.

¹Reported in 145 Pac. 978.

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Crow, J.—This is an action to quiet title, or in the alternative to rescind a sale of land and obtain other equitable relief. For some years prior to 1905, the defendant Alfred C. McNeley and one M. Jennie McNeley were husband and wife, and the record owners of twenty acres of land, in Spokane county, admitted to be their community property. They also held an unrecorded contract to purchase forty acres of adjoining land from W. A. Wright and wife, on which partial payments of purchase money were made during the lifetime of M. Jennie McNeley. On August 10, 1905, M. Jennie McNeley died intestate, leaving three minor children as her heirs at law. Two of these minor children, Harold J. McNeley and William J. McNeley, are defendants herein. The third minor child died intestate on October 6, 1906. After the death of M. Jennie McNeley, the defendant Alfred C. McNeley was appointed and qualified as administrator of her estate. In the inventory which he filed he included the twenty-acre tract to which they held title, but did not include the forty-acre tract upon which they held a contract of purchase. Later Alfred C. McNeley married the defendant Minnie McNeley, his present wife. The estate of M. Jennie McNeley, deceased, was closed, and the defendant Alfred C. McNeley was appointed and qualified as guardian of the person and estate of his surviving minor children. After the death of M. Jennie McNeley, Alfred C. McNeley completed payments to Wright and wife on the forty-acre tract, and took a deed therefor in which he was named as grantee. Later he and his present wife contracted to sell the forty-acre tract and the twenty-acre tract to the plaintiffs Alex. Battyany and Steve Battyany, for the total consideration of \$8,900. Judicial proceedings were instituted which authorized Alfred C. McNeley, as guardian of the minor heirs, to sell their interest in and to the twenty-acre tract, and it was included in the sale to Alex. and Steve Battyany. Later deeds were delivered to plaintiffs, although there is some dispute as to whether they intended to accept them or approve

the title conveyed. Plaintiffs paid \$2,000 on the purchase price and executed two notes and mortgages for \$1,900, the remainder thereof, one note and mortgage to Alfred C. McNeley on the forty-acre tract and one undivided half of the twenty-acre tract to secure \$1,575, and one note and mortgage to Alfred C. McNeley as guardian of Harold J. and William J. McNeley, minors, on the other undivided half of the twenty-acre tract to secure \$325.

At the time plaintiffs purchased the land, they had neither knowledge nor notice of the unrecorded contract of sale running from W. A. Wright and wife to Alfred C. McNeley and M. Jennie McNeley, but had knowledge of the recorded deed which had been executed and delivered to Alfred C. McNeley, a widower. Later plaintiffs learned that the minors and relatives of their deceased mother were claiming the forty-acre tract had been the community property of Alfred C. McNeley and M. Jennie McNeley, and that the minors each claimed a one-sixth interest therein. When plaintiffs, who had made valuable improvements on the land, learned of these claims, they demanded of Alfred C. McNeley that he take the proper and necessary steps to perfect their title. This he refused to do. Thereupon they commenced this action against Alfred C. McNeley, Minnie McNeley, his wife, and Harold J. McNeley and William J. McNeley, minors, and Alfred J. McNeley as their guardian, to quiet title or obtain alternative equitable relief. They pleaded substantially the facts above stated and asked, in the event their title could not be quieted, that their contract of purchase be rescinded; that they be given judgment for the purchase money they had paid and for the value of the permanent improvements they had made; that these sums be made a lien on the land, and that their notes and mortgages be canceled and returned to them.

The record shows that, when plaintiffs learned of the cloud on their title, they declined to pay interest on their notes and mortgages until their title could be quieted. The defendant Alfred C. McNeley, individually and as guardian for the

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minors, filed an answer in which he alleged that the forty-acre tract was his individual property and not the community property of himself and his former wife; that the title which had been conveyed to plaintiffs was perfect, and that they had made default in payments of interest on their notes; and asked for decrees foreclosing the mortgages. It appearing to the trial court that the claims of the defendant Alfred C. McNeley were adverse to the interests of his minor children and wards, an order was entered appointing John M. Gleason as guardian *ad litem* for the minor defendants. The guardian *ad litem* answered, claiming that the forty-acre tract was community property, and asking the court to protect the interests of the minors therein.

The principal issue tried was whether the forty-acre tract was the community property of Alfred C. McNeley and his deceased wife. During the trial, the plaintiffs announced their willingness to retain the land if their title could be quieted. To this, the guardian *ad litem* does not seem to have taken any exception, provided the interests of his wards could be so protected that they would receive their share of the purchase price for which the forty-acre tract had been sold.

After hearing the evidence, the trial judge found and decreed, that the forty-acre tract was community property; that the sale to plaintiffs had been made for a fair and valuable consideration; that plaintiffs were willing to retain the land; that the interests of the minors in the purchase price which plaintiffs had agreed to pay was \$975; that to secure this sum, that proportion of the unpaid purchase money mortgages should be decreed and paid to them; that the plaintiffs were justified in failing to pay interest until their title was quieted; that the mortgages should not be foreclosed; that the guardian *ad litem* should be authorized to make an application to the superior court to increase the bond of Alfred C. McNeley as guardian of the minors; that a fee of \$100 should be paid to the guardian *ad litem*, the

same to be a charge against the appellant Alfred C. McNeley and his interest in the mortgages; that the same should be paid directly to the guardian *ad litem*; that, in his discretion, the guardian *ad litem* might appeal on behalf of his wards from the final decree herein; that plaintiffs' title should be quieted, and that costs should be awarded against the defendant Alfred C. McNeley. From this decree, the defendants Alfred C. McNeley and Minnie McNeley have appealed. Alfred C. McNeley has also attempted to appeal as guardian of his minor wards. The latter appeal will not be considered, as the record clearly shows that the interests and contentions of Alfred C. McNeley are adverse to the interests of his wards. No cross-appeals have been taken.

The controlling issue before us is whether the forty-acre tract was the community property of Alfred C. McNeley and M. Jennie McNeley, his former wife. The appellants have filed a brief in which no assignments of error are made. Their arguments, however, indicate their contention that the forty-acre tract was the separate property of the appellant Alfred C. McNeley, that he acquired title thereto after the death of his former wife, that the payments made prior to her death were made by him from his separate funds, that he conveyed good title to the respondents, and that the minors had no interest in the forty-acre tract.

The respondents have filed no brief, nor have we had the benefit of any oral argument. There is an abstract which has not been helpful, and we have examined the statement of facts. This examination shows that a portion of the evidence has been omitted from the statement, and that certain exhibits which should be attached are not before us. However, there is sufficient before us to show beyond question that the evidence on the issue whether the forty-acre tract was community property was conflicting. The original Wright contract, which is in the record, ran to Alfred C. McNeley and M. Jennie McNeley, as grantees. While this fact may not be controlling, it indicates the intention and under-

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standing of the vendees at the time that the land should become their community property. There was evidence tending to show that payments on the Wright contract were made from funds belonging to appellant's former wife, and that such payments were made prior to her death. The trial court found the land was community property, and we are unable to find otherwise. As to the decree, no complaint is made by any party except the appellants Alfred C. McNeley and Minnie McNeley. The land being community property, and the rights of respondents and the minors having been protected to their complete satisfaction, we find nothing in the decree of which the appellants can successfully complain.

On the record before us, we conclude the judgment should be affirmed. It is so ordered.

MORRIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 12061. Department Two. January 29, 1915.]

RICHARD LEWIS, *Appellant*, v. ELIZABETH LEWIS,
Respondent.¹

DIVORCE—ALIMONY AND SUIT MONEY PENDING APPEAL—JURISDICTION. The superior court retains jurisdiction, after judgment in divorce actions, for the purpose of allowing suit money, attorney's fees and alimony pending appeal; in view of Rem. & Bal. Code, § 988, giving the court power to make such orders relative to expense so as to insure efficient preparation of the wife's case, and Id., § 1731, providing that on appeal the superior court shall retain jurisdiction for certain specified purposes, and "for all purposes in so far as the cause is not affected by the appeal;" especially in view of the rule that the supreme court is without jurisdiction to hear such applications pending the appeal.

APPEAL—REVIEW—COLLATERAL PROCEEDINGS—SCOPE. An appeal from an order allowing suit money pending appeal in a divorce case does not bring up for review questions involved in the principal action in which the appeal has been dismissed.

¹Reported in 145 Pac. 980.

Appeal by plaintiff from an order of the superior court for Pierce county, Card, J., entered September 22, 1913, allowing suit money and attorney's fees in a divorce case pending appeal. Affirmed.

H. W. Lueders, for appellant.

Anthony M. Arntson, for respondent.

MAIN, J.—This is an appeal from an order of the superior court allowing attorney's fees and suit money in a divorce action pending an appeal.

The facts are as follows: On the 3d day of December, 1912, the plaintiff brought an action against the defendant for a divorce. On March 10, 1913, after a trial, the superior court entered a judgment dismissing the action. On March 27, 1913, the plaintiff's motion for a new trial was overruled. On June 6, 1913, the plaintiff served his notice of appeal; and thereafter filed and served his bond on appeal. On August 14, 1913, the plaintiff served his opening brief. Thereupon the defendant petitioned the trial court for an order for suit money, attorney's fees, and alimony, in order that she might defend the action in this court. On September 22, 1913, an order was made by the trial court requiring the plaintiff to pay a certain sum as attorney's fees and suit money on appeal. Thereafter counsel for the defendant prepared, served, and filed on her behalf a brief. Subsequent to the service and filing of this brief, and on October 6, 1913, the plaintiff appealed from the order of September 22, which was the order allowing attorney's fees and suit money on appeal. On May 15, 1914, the plaintiff's appeal in the divorce action was, by this court, dismissed. Upon the present appeal, the cause is here for review of the order requiring the plaintiff to pay attorney's fees and suit money on appeal.

The principal question in the case is whether, in a divorce action after an appeal has been taken from the judgment of the superior court, that court has the power or jurisdiction

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to allow the wife attorney's fees, suit money, and alimony pending the appeal.

Rem. & Bal. Code, § 988 (P. C. 159 § 13), provides that:

"Pending the action for divorce the court, or judge thereof, may make . . . such orders relative to the expense of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof . . ."

Section 1731 (P. C. 81 § 1215) after providing that "the supreme court shall acquire jurisdiction of the appeal for all necessary purposes" provides, that the superior court shall retain jurisdiction for certain purposes specified and "for all purposes in so far as the cause is not affected by the appeal."

The order complained of here was entered after the appeal had been perfected. The allowance or disallowance of suit money, attorney's fees or alimony pending the appeal is not a part of the original judgment appealed from. Neither is it a matter embraced therein. The wife could not, in fact, make the application until after the appeal had been taken, because she could not have known that the husband intended to appeal from the judgment dismissing the action until the notice of appeal was served. We think, under the sections of the code above referred to, that the superior court retained jurisdiction and power, after the appeal, for the purpose of determining the question of suit money, attorney's fees, or alimony, pending the appeal.

In *Ex parte Lohmuller*, 103 Tex. 474, 129 S. W. 834, the supreme court of Texas under a statute similar in terms to that of § 988, *supra*, held, that the trial court retained power and jurisdiction, after an appeal had been perfected, to make an allowance to the wife. In the course of that opinion, it was said:

"The statute concerning divorces empowers 'the judge,' either in term time or vacation, to allow a wife who has not sufficient income for her maintenance, 'during the pendency

of the suit for divorce,' a sum for her support 'until a final decree shall be made in the case.' Rev. St., art. 2986. This is a power incidental to the jurisdiction over the suit for divorce in the exercise of which it becomes the duty of the court to see to the proper support and maintenance of the wife until it can be determined in the course of the proceeding whether or not she is to remain a wife. The full accomplishment of the purpose for which the power is granted requires that it last as long as the occasion for its exercise shall last, that is, 'during the pendency of the suit,' and hence the 'final decree'—that is, to put an end to the power—is that 'made in the case' (not necessarily that made by the district judge or the district court). The decree of the trial court granting or denying the divorce may be the final decree of that court, but it is not the final decree 'made in the case' when an appeal is taken to another tribunal. So long as the appeal is pending the suit is pending, and the occasion specified in the statute for the allowance of alimony continues, and it does not end until that decree is pronounced which puts an end to the case. The nature of the power is such as to make it incompatible with the notion that it can no longer be exercised after the district court has rendered a judgment for divorce and has adjourned, although an appeal has been taken. The facts remain that the case is still pending, that no final decree has been made in it, and that the wife is still in need of the provision as fully as she was before the judgment; and these are all the facts which the statute requires to make it the duty of 'the judge' to exercise the power.

"We do not mean to hold that the statute giving the power would justify the disregard of anything adjudicated by the decree of divorce. Nothing of the sort was done here. The action of the district judge was based upon conditions that did not exist, and therefore were not and could not have been passed on when the judgment was rendered, but have arisen since. Hence, we conclude that the principle which forbids a court to change its judgment after the expiration of the term at which it was rendered has no application."

Other courts holding to the same effect under similar statutes are these: *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065; *Roby v. Roby*, 9 Idaho 371, 74 Pac. 957; *Reilly v. Reilly*, 60 Cal. 624.

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In *Griffith v. Griffith*, 71 Wash. 56, 59, 127 Pac. 585, 128 Pac. 636, upon a rehearing, it was held: That this court was without jurisdiction to hear original applications for alimony, suit money, and attorneys' fees in a divorce action pending the appeal, and overruling the former holdings of the court upon that question. Our attention has not been called to the decision of any court holding that the trial court does not have jurisdiction after the appeal has been perfected in a divorce action to make an allowance for suit money, attorney's fees, or alimony pending the appeal, where the reviewing court is without jurisdiction, as in this state, to determine such matters. If there are such decisions, they have not been cited, nor has our investigation discovered any.

The plaintiff cites the cases of *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105, and *Gust v. Gust*, 71 Wash. 75, 127 Pac. 566, as sustaining his position. Neither of these cases is in point. In each of them, the subsequent or collateral order entered by the court was a modification of the previous judgment. In the present case, as already indicated, the subsequent or collateral order embodied a matter not embraced in the original judgment and which could not have been included therein.

Something is said in the plaintiff's brief relative to the principal action. But obviously the appeal from the collateral order does not bring up for review questions involved in the principal action in which the appeal has been dismissed.

The judgment will be affirmed.

CROW, MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12098. Department Two. January 29, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Lorenzo Dow,
Prosecuting Attorney etc., Respondent, v.
W. R. NICHOLS et al., Appellants.*¹

NUISANCE—DISORDERLY HOUSE—ABATEMENT—KNOWLEDGE OF OWNER OF BUILDING. In an action to abate a nuisance under the red light law, brought against the property and the lessees and owners of the building, it is immaterial that the owners had no knowledge that prostitution was being carried on at the place, if, in fact, it existed.

SAME—ABATEMENT—CIVIL ACTION—RIGHT TO JURY TRIAL. Under 3 Rem. & Bal. Code, § 946-1, of the red light law, in which the building or place in which assignation or prostitution is conducted or carried on and the furniture and contents are declared a nuisance, a jury trial cannot be demanded in a civil action brought in equity in the name of the state to abate the same, as authorized by Id., § 946-2.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 24, 1913, upon findings in favor of the plaintiff, in an action to abate a nuisance under the red light law. Affirmed.

C. M. Riddell, A. R. Titlow, and A. O. Burmeister, for appellants.

Lorenzo Dow and A. B. Comfort, for respondent.

MAIN, J.—The purpose of this action was to abate a nuisance and enjoin the continuance thereof. In the complaint, it is alleged that, on and from some time prior to October 18, 1913, a certain building or hotel, known as the Wilber, in the city of Tacoma, "was used for the purpose of lewdness, assignation and prostitution, and said place was at said time and is now a nuisance under the statutes of the state of Washington." The owners of the hotel, as well as the lessees,

¹Reported in 145 Pac. 986.

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were made parties defendant. They answered separately, denying the existence of the nuisance. After the issues had been thus framed, the defendants demanded a jury trial. This by the trial court was refused. The cause was tried to the court and a finding made,

"That on and prior to the 18th day of October, 1913, said building, together with the fixtures, furniture and movable property therein, was used for the purpose of lewdness, assignation and prostitution."

A judgment was entered abating the nuisance and closing the property for a period of six months. From this judgment, the defendants appeal.

In the brief, two questions are argued. First, Whether the finding that the building was used for the purpose of lewdness, assignation and prostitution is sustained by the evidence; and second, whether the trial court erred in denying a jury trial.

I. The action was brought under ch. 127, p. 391, Laws of 1913 (3 Rem. & Bal. Code, § 946-1 *et seq.*), generally known as the red light law. Section 1 of this act is dual in its provisions. It is there provided that whoever shall erect, establish, maintain, continue, use, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance; and also, that the *building* or *place*, or the *ground* itself, in or upon which lewdness, assignation or prostitution is conducted, permitted or carried on, continues or exists, and the furniture, fixtures, musical instruments, and contents are declared a nuisance.

Sec. 2 (Id. § 946-2) of the act provides that the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the state. The present action is one in equity, and is brought under the second provision of § 1 of the act which makes the place or building a nuisance, and not under the first provision which makes the person subject to be prosecuted by indictment or information.

The appellants claim that the evidence does not show that lewdness or prostitution was conducted or carried on in the building mentioned. This presents a question of fact. The statement of facts covers approximately two hundred and twenty-five pages. The appellants' abstract of the evidence covers less than two pages of typewritten matter. It does not set forth the evidence of the various witnesses in narrative form, nor contain references to the statement of facts, as required by the statute and the court rules. The abstract covers the evidence in general terms and is denominated by the abstracter as a "synopsis" of the evidence. No motion was interposed to strike this abstract. The respondent filed a supplemental abstract setting forth the testimony of certain of its witnesses in narrative form. Considering the testimony as it is found in these two abstracts, there is no question but what the finding of the trial court is sustained by the evidence. From the evidence abstracted, it plainly appears, not only that prostitution was carried on in the place mentioned, but that this was with the knowledge of one of the tenants.

It is said, however, that the owners of the property had no knowledge of the existence of the nuisance. This is doubtless true. But the fact that the owners had no knowledge that prostitution was being carried on at the place mentioned, would furnish no reason why the court should not abate such nuisance if, in fact, it existed.

II. The appellants argue their assignment of error based upon the refusal of the court to grant a jury trial, but cite no authority sustaining their position. As already stated, this action was brought on the equity side of the court. Under the statute, the building or place where prostitution is carried on is made a nuisance, and an action in equity is authorized to abate and enjoin the existence of such a nuisance. It is common learning that in an equitable action a jury trial cannot be demanded as a matter of right. Independent

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of the statute, an equity court has power in proper cases to abate and enjoin a bawdy house as a nuisance. In *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, speaking upon the contention that there was a plain, speedy and adequate remedy at law and that therefore the right did not exist in equity, the court said:

"The second contention of the appellant, while not entirely free from difficulty, we think is also without merit. It will be remembered that courts of equity have, from the earliest times, exercised jurisdiction to prevent and abate public nuisances, notwithstanding there has concurrently existed the common law remedies of indictment and action on the case. The jurisdiction was grounded on the inadequacy of the legal remedies; it being within the power of courts of equity, not only to abate an existing nuisance, but to do what the courts of law could not do—interpose and prevent threatened nuisances, and, by a perpetual injunction, make their remedies effectual throughout all future time. . . . Precedents are abundant where equity has interfered by injunction to prevent and abate public nuisances against which there existed the same common law remedies of indictment and action on the case that existed against the maintenance of a bawdy house. [Citing authorities.]"

In *State v. Jordan*, 72 Iowa 377, 34 N. W. 285, the supreme court of the state of Iowa, in an action brought under a statute which made the place where intoxicating liquors were sold unlawfully, a nuisance, held that the defendant could not demand a jury trial as a matter of right. It was there said:

"It is insisted that the statute is in conflict with the constitution of the United States, for the reason that it denies defendant the right of trial by jury, deprives her of her property without due process of law, and authorizes punishment without indictment by a grand jury. It is sufficient to say, in reply to these objections, that the action is brought in chancery to restrain the maintenance of a nuisance,—a subject of equitable cognizance before the statute was enacted,—and that the right to trial by jury in chancery cases is not secured by any constitutional provision. . . ."

The trial court did not err in refusing a jury trial. Had the action been brought under the first provision of § 1 of the statute, by information or indictment, and a jury trial been denied, a different question would be presented.

The judgment will be affirmed.

MOUNT, ELLIS, and CROW, JJ., concur.

[No. 12140. Department Two. January 29, 1915.]

MIANUS MOTOR WORKS, *Respondent*, v. B. H. VOLLANS,
Appellant.¹

SALES—IMPLIED WARRANTY—SUITABILITY FOR SPECIFIC PURPOSE—CONTRACT—PERFORMANCE. Under a contract for the construction of a new hoist for a gasoline logging engine, in accordance with a blue print and specifications, there is no implied warranty that the same, when constructed according to the contract and specifications, will be suitable for the specific purpose for which it was intended, or that the engine specified in the contract, when connected up with the hoist as a completed rig, would furnish sufficient power to do the work.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered February 14, 1914, granting a new trial, after rendition of a verdict of a jury favorable to the defendant, in an action on contract. Affirmed.

Cooley & Horan and R. Mulvihill, for appellant.

Louis A. Merrick, for respondent.

MAIN, J.—Plaintiff, as the assignee of the Automatic Machine Company, instituted this action for the purpose of recovering for certain machinery sold and delivered to the defendant. The defendant counterclaimed for damages alleged to be due to the breach of an implied warranty. The cause was tried to the court and a jury. The amount claimed to be due as alleged in the complaint was \$1,082.10. The

¹Reported in 145 Pac. 997.

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jury returned a verdict in the plaintiff's favor for \$66.80. A motion for a new trial was interposed upon the ground that the court had committed error in submitting the cause to the jury. This motion was sustained and an order entered granting a new trial, from which the defendant appeals.

The facts are substantially as follows: The Automatic Machine Company was a manufacturer and seller of gasoline engines. B. H. Vollans, the defendant, was engaged in the logging business, that is, removing piles and poles from the woods. On September 5, 1911, by conditional sale contract, the Automatic Machine Company sold to the defendant one twenty-five horse power two-cylinder gasoline engine, mounted on a double drum geared hoist, together with the other appurtenances for such a machine. This machine was used by the defendant in its logging operations for a number of months. The hoist apparently not being satisfactory, owing to the size and make of the drums, negotiations were entered into with the machine company relative to the construction of a new hoist. It was agreed that the old hoist should be taken back and a credit allowed for it in the sum of \$250, and that a new hoist should be constructed at a cost of \$1,750. From information and data given him by the foreman of the defendant and the representative of the machine company, one J. C. Biegert, owner of the Biegert Machine Works, prepared a blue print for the proposed hoist. Thereafter specifications and a contract were drawn. The specifications and contract were embodied in the same instrument. The blue print, specifications, and contract were submitted to the defendant, and the contract was signed by him. On February 8, 1912, the defendant returned the accepted copy of the specifications, together with his check for \$300 as applying on the purchase price.

The specifications, among other things, provided for a twenty-five horse power engine to be fitted on a cast iron frame, and also that "We will use the same engine on this rig that you now have in the woods." This was the engine

which had been sold under the contract of September 5, 1911, and subsequently used by the defendant until it was sent to the Biegert Machine Works to be mounted upon the new hoist which was to be constructed by that company. Thereafter, the Biegert Machine Works constructed the hoist and mounted the engine thereon. When the machine was completed, the foreman went to the machine works for the purpose of testing it. The machine was taken to a vacant block near the machine works, and there by the foreman tested. Being satisfactory, it was subsequently shipped to the point where the defendant was conducting his logging operations. At the time of, or shortly after the test, an additional payment was made on the purchase price. During the time the Biegert Machine Works was constructing the hoist, the defendant's foreman had certain changes or additions made not set out upon the blue print or in the specifications. The authority of the foreman is not denied. After the machine was returned to the woods with the new hoist, it proved unsatisfactory. It is claimed by the defendant that it was not suitable for the purpose for which it was constructed in that it would not develop the power necessary to do the work intended.

The action, as already indicated, was for the balance of the purchase price. The trial court, in instructing the jury in one or more instructions, stated, in effect, that the rule of law that where an article is sold or manufactured for a specific purpose, there is an implied warranty that it is suitable for such purpose, was applicable to the facts in this case. After a hearing upon the motion for a new trial, the trial court became convinced that this instruction was erroneous, and granted a new trial.

Under the undisputed facts in this case, the rule of law stated in the instructions was inapplicable, and it was therefore error to give it. The motion for a new trial was rightfully granted. The rights of the parties in this case are fixed by their written contract. This contract called for a

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hoist in accordance with the blue print and specifications. There is no claim that the hoist was not constructed as contracted for. The engine which was mounted upon the hoist was the one which the contract called for, and which had previously been used by the defendant.

This case falls within the rule announced in *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075. In that case there was a contract for one four hundred ton Howe type coal washer. In the first letter of proposal it was designated as "one four hundred ton coal bunker and washer." In the second letter of proposal it was designated as "a locally built washer of the Howe type." In the order it was designated as "one four hundred ton Howe type coal washer." In the letter of acceptance it was designated as "one four hundred ton Howe coal washer." And in the specifications it was designated as "one standard vertical type Howe coal washer, capacity four hundred tons per day." The specifications and blue prints were prepared and agreed upon by the parties before and at the time of entering into the contract. No contention was there made that the washer was not constructed in strict compliance therewith. It was there held that, the coal washer having been constructed in accordance with the specifications agreed upon by the parties, there was no warranty that it would wash four hundred tons of coal per day. In the course of the opinion it was said:

"When the parties to a contract designate the article to be manufactured in the manner here involved, and then proceed to agree upon detailed specifications and drawings as to the size and manner of construction of such article, we think the contract itself shows that the manner of so designating the article was nothing more than the use of a trade name or term for it, and the question of whether or not it is constructed in compliance with the terms of the contract is to be determined by the detailed specifications and drawings, and not by the mere name they may choose to call it, or the manner by which they may designate it, and that such

designation does not amount to a warranty as to its capabilities. [Citing authorities.]"

But it is claimed in this case that the engine when mounted upon the hoist manufactured by the Biegert Machine Works would not develop the power necessary to do the work, and that the engine was not covered by the blue print and specifications. The answer to this is that the engine and hoist became a completed rig. The engine used was the one specified in the contract, and which had been used by the defendant for some months. The contract and specifications were submitted to the defendant as a "proposal for gasoline logging engine." When the engine and hoist were connected, it was called by the foreman of the defendant, "a gasoline donkey."

The judgment will be affirmed.

CROW, MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 12189. Department Two. January 29, 1915.]

EUGENE TAYLOR, *Respondent*, v. CLAUS E. ANDRES *et al.*,
Appellants.¹

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE—SUFFICIENCY. A certificate to a statement of facts reciting that the matters and proceedings embodied therein are matters and proceedings occurring in said cause, fails to comply with Rem. & Bal. Code, § 391, requiring the trial judge to certify that the statement of facts "contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein . . . ;" and the supreme court will not look into the statement of facts to determine from its contents whether it does in fact contain "all the material facts," etc., as required by law.

Appeal from a judgment of the superior court for Skagit county, Pemberton, J., entered October 31, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

¹Reported in 145 Pac. 991.

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Opinion Per MAIN, J.

Shrauger & Henderson, for appellants.*Thomas Smith*, for respondent.

MAIN, J.—The purpose of this action was to recover damages for breach of a written contract. After the issues were framed, the cause was tried to the court and a jury. A verdict was returned in the sum of \$800. The defendants thereupon interposed a motion for a new trial upon various grounds. Upon hearing this motion, the court directed that a new trial would be granted unless the plaintiff should elect to remit from the verdict the sum of \$200. The plaintiff thereupon filed his election to accept a judgment for \$600. The motion in other respects was denied. A judgment was entered in favor of the plaintiff in the sum of \$600. The defendants appeal.

Upon this appeal, but one question is urged, and that is the misconduct of the jury. The respondent opens his answering brief with a motion to strike the statement of facts, one of the grounds of the motion being that the statement of facts is not certified as required by law. Aside from the formal parts, the certificate is as follows:

“That the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause.”

The statute, Rem. & Bal. Code, § 391 (P. C. 81 § 689), among other things, provides that, when such is the fact, the trial judge shall certify that the statement of facts “contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein” Comparing the certificate with the statute, the infirmity in the former readily appears. It nowhere appears in the certificate that the statement of facts contains all the material facts, matters and proceedings occurring in the cause not already a part of the record therein. Where it does not appear in the certificate to the statement of facts that the statement contains all the material facts

not already a part of the record necessary to the consideration of the case, the statement upon motion will be stricken. In the absence of such a certificate, it is presumed that the statement does not include all the material facts. *Kirby v. Collins*, 6 Wash. 297, 32 Pac. 1060; *State ex rel. Miller v. Seattle*, 45 Wash. 691, 89 Pac. 152. In the case last cited it was said:

"It is neither certified that the statement before us contains all the material matters and proceedings occurring in the cause which are not already a part of the record, nor that it contains such thereof as the parties have agreed to be all that are material therein. The statute makes it the duty of the trial judge to so certify when such are the facts. Bal. Code, § 5060 (P. C. § 677). In the absence of such a certificate it must, therefore, be presumed that the statement does not include all the material facts, and we are thus advised that all the material facts which were before the trial court and which controlled its action are not before us. . . ."

But the appellant claims that, since the only question is the misconduct of the jury, and the statement of facts contains an affidavit by each of the twelve jurors, it shows on its face that it contains all the material facts necessary to determine the question presented. This conclusion, we think, does not necessarily follow. The certificate being insufficient, the court will not look into the proposed statement of facts and attempt to determine from its contents whether it does in fact contain all the material facts and proceedings necessary to a consideration of the point involved. Had the certificate contained a statement that there were embodied in the statement of facts all the material facts, matters and proceedings not already a part of the record which were necessary to a determination of the question involved, a different question would be presented.

The motion to strike must be granted. The judgment will be affirmed.

Crow, Mount, Fullerton, and Ellis, JJ., concur.

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[No. 11951. Department One. February 1, 1915.]

G. W. SLATER, *Respondent*, v. J. P. LICH *et al.*, *Appellants*.¹

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. Where, in an action to foreclose a mechanics' lien, the action was fully tried out on the principal issues as to whether plaintiff had performed his contract and what sums were due on the contract price and for extras, and defendants claimed damages, the defendants were not prejudiced by the sustaining of a demurrer to their defense that a clause in the contract required the delivery of receipts for all labor and material, where the clause was ambiguous and it was not shown that any sums unpaid by the contractor were lienable claims against the property.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered November 1, 1913, in favor of the plaintiff, in an action to foreclose a mechanics' lien, after a trial on the merits to the court. Affirmed.

Chas. L. Chamberlin and *Chas. P. Lund*, for appellants.

Neill & Burgunder, for respondent.

Crow, J.—The defendants, J. P. Lich and Myrtle Lich, his wife, are the owners of certain improved lots in the city of Colfax, in Whitman county. In March, 1913, the plaintiff, G. W. Slater, and the defendant J. P. Lich executed a written building contract, whereby the plaintiff, for the stipulated price of \$3,849.60, agreed to furnish the labor and material necessary to construct an addition to a building then on the lots. Plaintiff, claiming that he had completed his contract in accordance with the plans and specifications, that he had also done extra work and had furnished extra material to the total value of \$404.50, and that the defendants had paid him only \$1,994.70 on the contract price, filed a claim for lien against the building and lots, and commenced this action to foreclose such lien. After issue joined and after trial, the trial judge, without making findings of fact, en-

¹Reported in 145 Pac. 996.

tered a decree in plaintiff's favor for \$1,881.90; \$200 attorney's fees and costs; and for the foreclosure of the lien. From this decree, the defendants have appealed.

Appellants' first assignment is that the trial judge erred in sustaining respondent's demurrer to their second affirmative defense. The allegations of their answer predicate this defense upon clause four of the building contract, which reads as follows:

"When the building is finished as per all plans, specifications and contract, a turnkey, broom cleaned job and upon the presentation of all receipts for all money paid out by said Slater for work done on the job, and for all material furnished by any and all parties, and every transaction closed up and accepted by any and all parties in a satisfactory and business way, then said J. P. Lich is to pay G. W. Slater the remainder of the contract price to be paid for said job."

After pleading this clause, appellants alleged that the respondent had contracted debts for materials used in the construction of the building to the Potlatch Lumber Company in the sum of \$1,037, to one P. F. Chadwick in the sum of \$800, and to one J. O. Housekeeper in the sum of \$100; that respondent had not made payments thereof; that he had not presented receipts for any payments thereof, and that he was not entitled to maintain this action.

Upon consideration of clause four of the contract above quoted, we must confess that we find it somewhat ambiguous. If it makes any provision at all, it is that the respondent should present to appellant receipts for all bills *paid* by him for labor performed and materials furnished in the progress of the work. There is no allegation that this was not done. The clause did not provide that respondent should pay all bills as a condition precedent to the recovery of any balance due him on the contract. There is no allegation that the materialmen named had complied with the requirements of 3 Rem. & Bal. Code, § 1133, by delivering or mailing notices and statements to appellant. In the absence of this

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allegation, the answer did not show that the amounts due the materialmen were for lienable items. If they were not, neither appellants nor their property could be held for their payment. There is no suggestion that these materialmen were seeking to obtain or enforce liens against appellants' property. Although the demurrer was sustained to the second affirmative defense, the action was fully tried upon its merits and upon other defenses pleaded. The issues tried were, whether respondent had performed his contract and what sums were due him on the contract price and for extras. Appellants, by other affirmative defenses, claimed damages for respondent's alleged failure to complete the contract and for his negligence in its performance. These issues were also tried. Considering this condition of the record, we fail to see how appellants have been prejudiced by the order sustaining the demurrer, whatever may have been the meaning or correct interpretation of clause four of the contract.

The remaining assignments of error involve a consideration of the evidence introduced by the respective parties for the purpose of sustaining their respective claims. This evidence was conflicting and voluminous, and no good purpose would be served by an attempt to state it in detail. The trial court found the amount due respondent to be less than he claimed, but awarded him a judgment in excess of the sum which appellants in effect conceded to be due. We are unable to say that this result is not supported by the evidence. After an examination of the record, we conclude that the final judgment should not be disturbed. It will therefore be affirmed.

MAIN, ELLIS, and PARKER, JJ., concur.

[No. 12165. Department Two. February 1, 1915.]

ARTHUR & COMPANY, *Respondent*, v. J. R. BURKE,
Appellant.¹

LIMITATION OF ACTIONS — WHAT LAW GOVERNS — LAW OF FORUM. Where a creditor elects to sue in this state, where the debtor had resided ever since the inception of the debt, the statute of limitations of the forum governs.

SAME—DEFENSE. The statute of limitations is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts.

LIMITATION OF ACTIONS—TOLLING STATUTE—PARTIAL PAYMENTS—BURDEN OF PROOF. Credits of partial payments do not toll the statute of limitations unless a voluntary payment was authorized or ratified by the debtor; mere indorsement is not competent proof of the date of payment, and the burden of proof rests upon the party asserting it.

SAME—TOLLING STATUTE—CREDIT ON NOTES—INTENTION OF DEBTOR—EVIDENCE—SUFFICIENCY. Indorsements of partial payments upon notes are not sufficient to toll the statute of limitations where it appears that the debtor, then owing \$600 on account, without regard to consigned goods, reconsigned the goods held on consignment for sale on commission with directions to credit his account with the proceeds when the goods were sold, and two years later, at the request of the creditor, executed notes for the \$600 representing the balance due on account, upon which credits were later indorsed for antecedent sales of the reconsigned goods, the date of which sales were not shown but which must have been more than six years prior to the commencement of the action; since all intention of the debtor to have credits indorsed on the notes was negatived by the fact that the notes were not made until two years after the arrangement for such credits, and that no reference thereto was made at the time the notes were given.

SAME—PART PAYMENTS—REVIVAL OF DEBT — EVIDENCE — SUFFICIENCY. A barred debt is not revived by part payment unless the circumstances show a clear and unequivocal intention on the part of the obligor to revive the whole debt; and assent to a revival of notes is not shown by the sale of goods and credit of the proceeds, without notice to the debtor, ten years after the notes were given.

¹Reported in 145 Pac. 974.

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Appeal from a judgment of the superior court for King county, Smith, J., entered March 21, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Frank A. Paul and Hastings & Stedman, for appellant.

ELLIS, J.—This action was commenced on March 21, 1912, upon three promissory notes, executed and delivered by the defendant to the plaintiff, dated February 15, 1901, at Portland, Oregon, for \$200 each, and payable in two, four and six months, respectively. The plaintiff alleged the payment on March 21, 1906, of \$27.21 on each note. The defendant in his answer alleged the execution and delivery of the notes at Spokane, Washington, denied the partial payments, and set up affirmatively the bar of the statute of limitations.

The evidence was conflicting. It is undisputed, however, that, for some time prior to 1899, the defendant was engaged in business at Spokane, Washington, and was selling goods purchased from, and goods consigned on commission by, the plaintiff. In May, 1899, the defendant terminated his business at Spokane, and having a small quantity of shelf goods on hand, reconsigned them to the plaintiff at Portland, Oregon, with instructions to credit the account of Northwest Machinery Company (defendant's trade name) with their proceeds when sold. At that time, the defendant owed the plaintiff a considerable balance on account, and in February, 1901, plaintiff sent him the three notes for execution.

Each party introduced but one witness. Plaintiff's president testified that, at the time of execution of the notes, the sum of \$600 represented the balance due on defendant's account, without regard to the reconsigned goods plaintiff still had on hand. Defendant testified that it was his understanding at that time that the notes represented the balance due the plaintiff after crediting the proceeds of all of the reconsigned goods. Plaintiff's witness testified that defendant came to Portland and executed the notes there. De-

fendant testified he was not in Portland at any time between 1899 and 1910, and that the notes were executed at Spokane and mailed by him from there to the plaintiff at Portland.

Plaintiff's president testified credit memoranda were forwarded to defendant by mail at different times after the execution of the notes. Purported copies of such memoranda were introduced. He could only say, however, that he supposed they were mailed in the course of business. One of these was dated March 21, 1906, and amounted to \$81.62. The plaintiff indorsed one-third of this credit as a payment on each note on March 21, 1906. This witness testified that the goods making up this credit were probably all sold sometime prior to March 21, 1906. He also testified that there were other credits amounting to \$9.42 rendered defendant on account of the remainder of the reconsigned goods, one in 1907 and the last in 1913, and stated that defendant had been advised of this by mail.

Defendant denied ever having received any of the letters or credit memoranda and denied having had any correspondence with plaintiff subsequent to the execution of the notes or that he ever knew of or consented to the credit indorsements on the notes.

The lower court found that the notes were executed and delivered at Portland, Oregon, and that a total credit of \$27.21 had been made by plaintiff on each note between February 15, 1901, and March 21, 1906, pursuant to the agreement between the parties at the time of the execution of the notes that the proceeds of the reconsigned goods should be credited on the notes as sales were made; and thereupon entered judgment in favor of plaintiff. The defendant appealed.

The sole question presented by this appeal is whether the application upon the notes by the respondent of the moneys realized on sales of the reconsigned goods, tolled the running of the statute of limitations.

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We are convinced that, by a preponderance of the evidence, it was shown that the notes were executed by the appellant at Spokane, Washington. This, however, is immaterial, since the respondent elected to sue in this state where the appellant has resided ever since the inception of the debt. In such a case, it is the statute of limitations of the forum which governs. *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107, 85 Am. St. 939; *Adams v. Kelly*, 2 Wash. Terr. 263, 5 Pac. 601; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473.

It is the settled law of the state, in common with many others, that the defense of the statute of limitations is not inately unconscionable but is entitled to the same consideration as any other defense. The statute is a legislative declaration of public policy which the courts can do no less than respect. *Thomas v. Price*, 33 Wash. 459, 74 Pac. 563, 99 Am. St. 961; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Clementson v. Williams*, 8 Cranch 72; *United States v. Wilder*, 13 Wall. 254.

It is also the settled law of this state, following the trend of authority in others, that in order to toll the statute of limitations, the partial payment must have been a voluntary payment made or authorized or ratified by the party against whom the payment is invoked as tolling the statute. *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637; *Bassett v. Thrall*, 21 Wash. 231, 57 Pac. 806; 1 Wood, Limitations (2d ed.), § 97; *Good v. Ehrlich*, 67 Kan. 94, 72 Pac. 545; *Sawyer v. Lufkin*, 58 Me. 429; *Arnold v. Downing*, 11 Barb. 554; *Butler v. Price*, 110 Mass. 97; *Dundee Mortgage & Trust Inv. Co. v. Horner*, 30 Ore. 558, 48 Pac. 175.

A creditor cannot by any act of his own, such as the giving of an unauthorized or surreptitious credit, toll the running of the statute. *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* (Kan.), 70 Pac. 933; *Pease v. Catlin*, 1 Ill. App. 88; *Samuel v. Samuel's Admr.*, 151 Ky. 235, 151 S. W. 676;

Chapman v. Hogg, 135 Mo. App. 654; *Good v. Ehrlich*, *supra*.

When reliance is placed upon a part payment to remove the bar of the statute and the payment is denied, the burden of proving the payment within the statutory period rests upon the party asserting it. *United States Trust Co. v. Stanton*, 27 N. Y. Supp. 614; *Gregory v. Filbeck's Estate*, 20 Colo. App. 131, 77 Pac. 369; *Harding v. Grim*, 25 Ore. 506, 36 Pac. 634; *Scott v. Christenson*, 46 Ore. 417, 80 Pac. 731.

It is the fact of partial payment, and not the formal entry of credit, which tolls the statute. The creditor will not be permitted to defeat the statute by making belated credits. There must be affirmative proof of the time of actual payment. *Terrill v. Deavitt*, 73 Vt. 188, 50 Atl. 801; *Fowles v. Joslyn*, 130 Mich. 272, 89 N. W. 946; *Briscoe v. Huff*, 75 Mo. App. 288; *Freeze v. Lockhard*, 87 Mo. App. 102; *Elsea v. Pryor*, 87 Mo. App. 157; *Davidson v. Delano*, 11 Allen 523; *Gibbs v. Gibbs*, 6 Colo. App. 368, 40 Pac. 781; *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268; *United States Trust Co. v. Stanton*, *supra*.

The indorsement by the holder of a note of a payment thereon is not competent evidence of the true date of payment so as to take it out of the operation of the statute. *Smith v. Wells*, 70 N. H. 49, 46 Atl. 51; *Schlotfeldt v. Bull*, 18 Wash. 64, 50 Pac. 590.

The rationale of these principles is this: the payment must be made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of payment, from which arises a new implied promise, supported by the original consideration, to pay the residue. *Dundee Mortgage & Trust Inv. Co. v. Horner*, *supra*; *Becker v. Oliver*, 111 Fed. 672; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. 315; *Campbell v. Baldwin*, 130 Mass. 199; *Leach v. Asher*, 20 Mo. App.

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656; *Pease v. Catlin*, and *United States v. Wilder*, *supra*.

Applying these principles to the case in hand, we are convinced that the action was barred by the statute of limitations. In the first place, the respondent's own evidence wholly failed to show that any of the sales of the reconsigned goods represented by the credit of \$81.62, apportioned and indorsed, \$27.21 upon each of the notes, on March 21, 1906, were made on that day. On the contrary, the respondent's president admitted that they were probably all made prior to that time. He could not even say that any of these goods were paid for on that day or subsequently. The action having been commenced on the last day of the six-year period after the date of these credits and the actual sales having been made prior to that date, it is clear that these credits, representing antecedent sales, were wholly insufficient to show any actual payment within six years prior to the date of suit.

But there is another reason which goes deeper than this. The reconsignment of the goods was never made with the intention that moneys realized from their sale should be applied upon these notes. The notes were not executed until almost two years later. The appellant's testimony that he understood when the notes were given that he had already received credit for all of the reconsigned goods is undisputed. It is negatively corroborated by the admission of the respondent's president that nothing was said about the goods at that time. Upon these facts, we are clear that payments, no matter when made, from money realized from sales of the goods, were not payments made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of the sales, from which a new promise could be implied to pay the residue.

Had the reconsignment of the shelf goods been made at the time the notes were given and as a part of the same transaction as collateral to the notes, a different case would be presented. Even in such a case, however, it has been usually held that where part payment of a note is made from money

realized by the sale of collateral, a new promise is not to be implied as of the date of the sale of the collateral nor as of any date later than the transfer of the collateral to the creditor. *Wolford v. Cook*, *supra*; *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568; *Jones v. Langhorne* (rehearing), 19 Colo. 206, 34 Pac. 997; *Thomas v. Brewer*, 55 Iowa 227, 7 N. W. 571; *Campbell v. Baldwin* and *Leach v. Asher*, *supra*.

In *Wolford v. Cook*, 71 Minn. at page 79, 73 N. W. 706, it is said:

"Wolford's right to receive the proceeds of the collateral mortgages, and apply them in part payment of defendant's note, was acquired under and by virtue of the contract made at the time the collaterals were transferred to him. His subsequent exercise of that right was not a voluntary payment made by the defendant from which a promise to pay the residue can be inferred. The defendant had done nothing since he transferred the collaterals to Wolford in March, 1889. The fact that he made no objection when informed by Wolford that he had applied the proceeds of these collaterals on his note could not take the case out of the statute. He had no reason to object, and, if he had done so, it would have been futile. Wolford had merely exercised a contract right which he acquired in 1889. Defendant's passive acquiescence in the exercise of that right constituted neither a voluntary payment as of that date, nor a new promise in writing to pay the balance of the debt. *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 N. Y. 352; *Brown v. Latham*, 58 N. H. 30."

In *Brown v. Latham*, 58 N. H. at pages 35, 36, it is said:

"The plaintiff's right, in this case, to receive the proceeds and to apply them in part payment, and his exercise of that right within six years of the date of the writ, were neither a promise made by the defendant within that time to pay the residue of the debt, nor an acknowledgment made by the defendant within that time of his liability and willingness to pay the residue, nor evidence from which it can be inferred that within that time the defendant made, or intended to make, or was understood to make, such promise or acknowl-

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edgment. What the defendant did in 1862 was an acknowledgment of a liability and a promise to pay at that time, but it has no tendency to prove that he afterwards made such promise and acknowledgment, or authorized them to be made. The placing of the security in the plaintiff's hands was of no greater force or effect than the giving of the note itself."

The same rule is strongly indorsed in 1 Wood, Limitations (2d ed.), page 282 *et seq.*, as follows:

"Nor does a part payment derived from a collateral security, without the debtor's assent to it *as a payment*, operate to remove the statute bar; and although in some of the cases it is intimated that a sale of collaterals made *within a reasonable* time after they are deposited with the creditor, and the proceeds applied upon the debt, may operate as a part payment at the date of the receipt of such proceeds, yet this doctrine is believed to be fallacious, and rests upon the mistaken notion that the creditor is thereby made an agent of the debtor for the collection or sale of such collaterals, ignoring the circumstance that the creditor cannot be made the agent of the debtor to such an extent as to make an act done by him, operate as a new promise to himself, without which ingredient or element a payment cannot operate to remove the statute bar; and according to the later cases it seems that the question as to whether the creditor exercises diligence or not, in the sale or collection of the collaterals, has no influence upon the question of part payment, as the statute can, in any event, only be suspended by some act of the debtor, or some person authorized by him, from which a new promise may be inferred, and in this view the suspension of the statute could only be claimed from the time when such collaterals were deposited with the creditor."

The grounds of the foregoing authorities seem to us sound, but it is not necessary to adopt them here. We need not go so far. Here, the reconsignment of the shelf goods, for sale and application of the proceeds on the debtor's account, was made nearly two years before the notes were ever thought of, and it would be doing violence to any possible intention of the parties to say that, at the time of the transaction, it was

the intention that the sale of the goods should be applied on the notes so as to constitute an acknowledgment of the whole debt, or a promise to pay the balance of the notes by the debtor. Unless this can be implied from the original reassignment, it cannot be implied at all, since there is no evidence that there was any agreement touching the goods at the time the notes were given or at any subsequent time.

As to the \$9.42 payment resulting from the sales made after March 21, 1906, one of them, indeed, after the commencement of this action, there can be no question that, even had it been indorsed upon the notes, it could not operate as a renewal of the notes already barred. Even assuming that a barred debt may be revived by part payment, the payment must be made under circumstances showing a clear and unequivocal intention on the part of the obligor to revive the whole debt. The naked fact of payment or entry of credit is wholly insufficient. *Kaufman v. Broughton*, 31 Ohio St. 424.

The appellant cannot be held to have assented to what he did not know. The burden was on the respondent to prove that he did assent. There was absolutely no evidence that the appellant had any knowledge that the tag ends of his old stock, represented by this \$9.42 had not been disposed of long before. He had turned the goods over to the respondent twelve years before the last sale testified to was made. It would be going farther than any authority which we have been able to find to hold that the appellant assented to a revival, by the sale of the goods, after the notes given ten years before had long been barred.

The case of *Becker v. Oliver*, *supra*, is instructive as going to every phase of the case here. See, also, *Easter v. Easter*, 44 Kan. 151, 24 Pac. 57.

The judgment is reversed, and the case is remanded for dismissal.

CROW, MAIN, MOUNT, and FULLERTON, JJ., concur.

Jan. 1915]

Opinion Per Curiam.

[No. 12219. Department Two. December 22, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. S. P. GARNESS, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 6, 1914, upon a trial before the court, a jury being waived, and a conviction of a misdemeanor in violating the act relating to building and loan associations. Affirmed.

John W. Roberts and *Howard O. Durk*, for appellant.

John F. Murphy and *H. B. Butler*, for respondent.

PER CURIAM.—This case is in all respects the same as the case of *State v. Merrill*, ante p. 8, 144 Pac. 925, except that the corporation attempting to do business in this state is a corporation of the state of Alabama instead of British Columbia. The method of conducting business in this state was the same method pursued as stated in the other case; and the character of business was also the same. The appellant was convicted upon substantially the same evidence and has appealed from a judgment imposing a fine of \$1 and costs. For the reasons stated in the case of *State v. Merrill*, the judgment in this case is affirmed.

[No. 12404. January 13, 1915.]THE STATE OF WASHINGTON, *Appellant*, v. JOHN G. JOHNSON,
Respondent.²

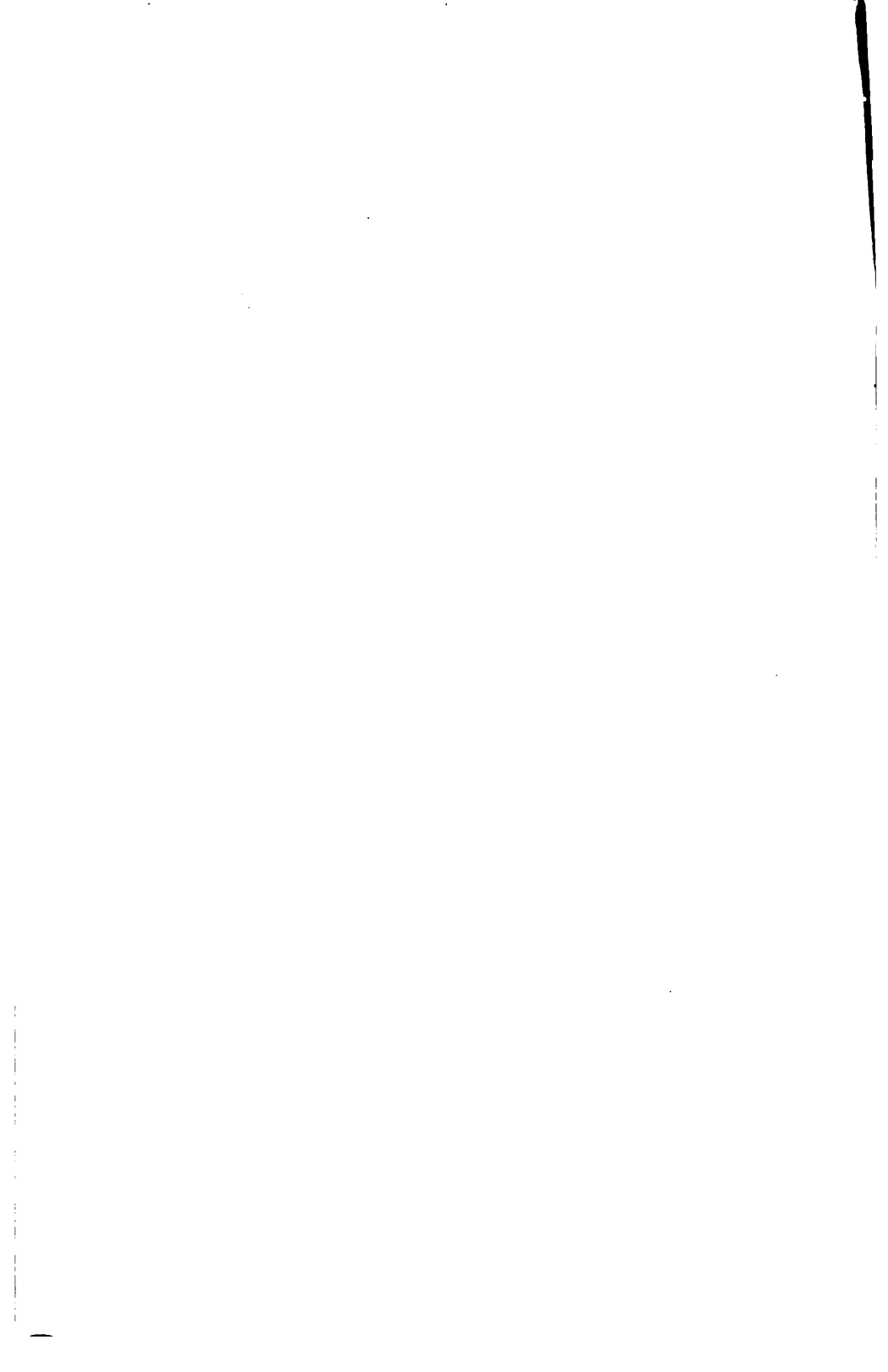
Appeal from a judgment of the superior court for Mason county, Claypool, J., entered May 4, 1914, dismissing as insufficient an information for taking oysters from state oyster land reserves. Reversed.

R. A. Lathrop, for appellant.

PER CURIAM.—Appeal by the state from a judgment dismissing an information and discharging the accused upon the ground that the information did not state facts sufficient to constitute a crime. The defendant in this case is the same as in *State v. Johnson*, 82 Wash. 347, 144 Pac. 57, and the appeal raises the identical question passed upon in that case. Upon the authority of that case, and for the reasons therein stated, the judgment is reversed.

¹Reported in 144 Pac. 929.

²Reported in 145 Pac. 1167.



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ADVERSE POSSESSION:

See **LIMITATION OF ACTIONS**, 3.

1. **ADVERSE POSSESSION—DISPUTED BOUNDARY—MISTAKE.** Where neither of two adjoining landowners intends to claim beyond the true boundary line set out in their deeds, possession by mistake to an erroneous line does not work a disseisin as against the other under the seven-year statute, Rem. & Bal. Code, §§ 786, 788, by possession under color of title and payment of taxes. *Snell v. Stelling* 248

AFFIDAVITS:

As part of record on appeal, see **APPEAL AND ERROR**, 6, 7.

AGISTERS:

Liens of, see **ANIMALS**.

AGREEMENT:

See **CONTRACTS**.

As to boundary, see **BOUNDARIES**, 2.

AGRICULTURE:

Irrigation, see **WATERS AND WATER COURSES**, 6-9.

ALIMONY:

Pending appeal, see **DIVORCE**, 3.

ALLOWANCE:

Of costs on cross-appeals, see **COSTS**.

To surviving wife, see **EXECUTORS AND ADMINISTRATORS**, 2.

AMENDMENT:

Of statute, see **STATUTES**.

ANIMALS:

1. **ANIMALS—AGISTER'S LIEN—PERSONS ENTITLED.** No agister's lien on a span of horses can be claimed by one who obtained possession under a special contract to keep the horses for their use without cost, and redeliver the horses at any time upon demand. *Donofrio v. Watson Brothers* 41

APPEAL AND ERROR:

See **CERTIORARI**.

Costs on appeal, see **COSTS**.

Review in criminal prosecutions, see **CRIMINAL LAW**, 6, 7.

Allowance of alimony and suit money pending appeal, see **DIVORCE**, 3.

Condemnation proceedings, see **EMINENT DOMAIN**, 3, 4.

Review of discretion as to regulation and control of streets, see **MUNICIPAL CORPORATIONS**, 16.

Effect of reversal of order dissolving attachment on sheriff's liability after return of property, see **SHERIFFS AND CONSTABLES**.

IV. RIGHT TO APPEAL.

1. **APPEAL—PARTIES ENTITLED — GUARDIAN — ADVERSE INTERESTS.** Where defendant was sued individually and as guardian for minor children, whose interests were adverse to him, and a guardian *ad litem* had been appointed, on judgment against the defendant individually, he cannot appeal as general guardian for the infants. *Battyany v. McNeley*..... 666

V. PRESERVATION AND RESERVATION IN LOWER COURT.

2. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO EVIDENCE.** Where the court makes complete findings of its own, after duly considering the evidence and interrogatories submitted to an advisory jury and the jury's answers thereto, and the judgment is entered upon the findings of the court, exceptions thereto are necessary in order to review the evidence on appeal. *Yarbrough v. Pelkisser* 49

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

3. **APPEAL—NOTICE—ORAL NOTICE.** An oral notice of appeal at the time of the rendition of the judgment is sufficient, under Rem. & Bal. Code, § 1719. *Benjamin v. Ernst*..... 59

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

4. **APPEAL—SUPERSEDEAS BOND—FORM.** A supersedeas bond on appeal conditioned to pay the judgment, fairly indicating that it is

APPEAL AND ERROR—CONTINUED.

given on behalf of all the appellants, is sufficient, on objection first made in the supreme court, although the wife of one of the principals did not join in the bond. *Dibert v. Petersen*..... 479

X. RECORD.

5. **APPEAL—RECORD—EXCEPTIONS—TIME FOR TAKING.** Under Rem. & Bal. Code, § 383, exceptions to findings of fact, in order to secure a review of the evidence, must be taken within five days after the findings are filed or notice given, or if notice is not given, then within five days after acquiring notice of the decision in any way. *Meeker v. Waddle*..... 628
6. **APPEAL—RECORD—AFFIDAVITS.** Misconduct of counsel in argument to the jury occurring in the presence of the court cannot be shown on appeal by affidavits setting forth the acts constituting such misconduct; since the language used must be certified to by the trial judge. *State v. Johnston*..... 1
7. **APPEAL—RECORD—AFFIDAVITS.** Affidavits upon a motion for a new trial cannot be considered unless included in the statement of facts. *Lebovitz v. Cogswell*..... 174
8. **APPEAL—RECORD—STATEMENT OF FACTS.** Where an appeal is based upon the insufficiency of the complaint, no statement of facts is necessary. *Benjamin v. Ernst*..... 59
9. **APPEAL—RECORD—STATEMENT OF FACTS—FAILURE TO EXCEPT TO FINDINGS.** Failure to except to findings of fact does not preclude all review on appeal or require the statement to be stricken, where the sufficiency of the complaint and of the plaintiff's evidence to support any decree in favor of the plaintiff was raised by demurrer to the complaint and motion for nonsuit, and the record contains the pleadings and all the evidence. *Meeker v. Waddle*..... 628
10. **APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY—CERTIFICATE.** The sufficiency of the evidence to support the verdict cannot be considered in the absence of a properly certified statement of facts; and it is not sufficient to certify that the matters and proceedings embodied in the bill are matters and proceedings occurring in the cause, and that the attached exhibits were all the exhibits "admitted upon the trial of said cause." *Lebovitz v. Cogswell*..... 174
11. **APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE—SUFFICIENCY.** A certificate to a statement of facts reciting that the matters and proceedings embodied therein are matters and proceedings occurring in said cause, fails to comply with Rem. & Bal. Code, § 391, requiring the trial judge to certify that the statement of facts "contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein . . .," and the supreme court will not look into the statement of facts to determine from its contents whether it does in fact contain

APPEAL AND ERROR—CONTINUED.

- "all the material facts," etc., as required by law. *Taylor v. Andres* 684
12. APPEAL—RECORD—ABSTRACT—NECESSITY. Where no copy of the abstract was served upon two of the respondents, separately appearing, the appeal will be dismissed as to them. *Silvain v. Benson* 271
13. APPEAL — RECORD — EVIDENCE — ABSTRACT — NECESSITY. Where no question is made upon the evidence, appellant need not bring it up on appeal or abstract it, or make any reference to it in the abstract. *Mondiot & Stewart v. American Building Co.*..... 584
14. SAME—RECORD—ABSTRACT. An abstract of the evidence need not quote the evidence, if it is stated in clear, narrative form with reasonable fullness. *King v. King*..... 615
15. APPEAL—REVIEW—ABSTRACTS OF RECORD. Where the abstract of the evidence contains no evidence of a fact in question, the court will not search the statement of facts for testimony therein to which no reference is made in the abstract. *Silvain v. Benson*..... 271
16. SAME—RECORD—ABSTRACTS—INSTRUCTIONS. An appeal will not be dismissed for failure of the abstract to contain any of the instructions except those complained of, where the other instructions as set out in respondents' supplemental abstract did not modify or control the instructions complained of. *King v. King*..... 615

XI. BRIEFS.

17. APPEAL—BRIEFS—REFERENCE TO ABSTRACT. An appeal will not be dismissed for failure of the brief to refer to the abstract, where the only point made is on the findings, which are in the abstract and quoted in full in the brief. *Mondiot & Stewart v. American Building Co.* 584
18. APPEAL—BRIEFS—REFERENCE TO RECORD—DISMISSAL. An appeal will not be dismissed for failure of the appellants' brief to refer to the statement of facts or abstract, where the respondents' brief is equally faulty. *King v. King*..... 615

XVI. REVIEW.

19. APPEAL—REVIEW — COLLATERAL PROCEEDINGS — SCOPE. An appeal from an order allowing suit money pending appeal in a divorce case does not bring up for review questions involved in the principal action in which the appeal has been dismissed. *Lewis v. Lewis* 671
20. APPEAL—REVIEW—ERROR INVITED BY APPELLANT. Appellant cannot urge as error instructions given by the trial court at appellant's request. *Olson v. Carlson*..... 415
21. APPEAL — REVIEW — ERROR INVITED BY APPELLANT. Where appellant first objected to certain evidence as inadmissible, the objection was sustained, and respondent acquiesced in such ruling by with-

APPEAL AND ERROR—CONTINUED.

- drawing the question, error cannot be predicated on the rejection of similar evidence offered by the appellant over respondent's objection; as the error was invited by appellant. *Pettett v. Johnston* 663
22. APPEAL—REVIEW—PREJUDICE—PRESUMPTIONS. Prejudice will be presumed from erroneous instructions on material questions, unless it clearly appears from the whole case that there was no prejudice. *Nordeen Iron Works v. Rucker*..... 126
23. APPEAL—REVIEW—DISCRETION—NEW TRIAL. The discretion of the trial court in granting a new trial will not be disturbed on appeal, unless there was a clear abuse of discretion, or the record discloses that the order was made because of a misconception of the law. *Nordeen Iron Works v. Rucker*..... 126
24. APPEAL—REVIEW—FINDINGS. Findings upon conflicting oral testimony which was mostly opinion evidence will not be disturbed on appeal, where there was ample room for difference in the conclusions to be drawn therefrom. *Dishman v. Strom*..... 230
25. APPEAL AND ERROR—INADEQUATE DAMAGES—FINDING—SUFFICIENCY OF EVIDENCE. A finding by the court, who has viewed the land, as to the amount of damages incurred from loss of a growing crop through defendant's negligence, will not be disturbed as inadequate, although the evidence is sufficient to sustain a finding in a greater sum. *Berg v. Yakima Valley Canal Co.*..... 451
26. APPEAL—REVIEW—ERRORS NOT AFFECTING SUBSTANTIAL RIGHTS—REMAND FOR FINDINGS OF FACT. Under Rem. & Bal. Code, § 307, providing that the court shall disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed by reason thereof, the supreme court, on reversing a cause for failure of the trial judge to make findings of fact and conclusions of law, will remand the case to the court below with instructions to make such findings and enter judgment thereon. *Colvin v. Clark*..... 376
27. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS—WAIVER OF OBJECTIONS. Under Rem. & Bal. Code, § 307, requiring the supreme court to disregard all errors on appeal which do not affect the substantial rights of the complaining party, the failure of the defendant to designate his affirmative defense as a cross-complaint or counterclaim should be deemed harmless error, where his prayer was for the aggregate of the compensation and damages claimed, and the case was tried upon the merits after the plaintiffs had joined issue upon such affirmative matter. *Zindorf v. Tillotson*..... 472
28. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. Where, in an action to foreclose a mechanics' lien, the action was fully tried out on the principal issues as to whether plaintiff had performed his contract and what sums were due on the contract price and for

APPEAL AND ERROR—CONTINUED.

- extras, and defendants claimed damages, the defendants were not prejudiced by the sustaining of a demurrer to their defense that a clause in the contract required the delivery of receipts for all labor and material, where the clause was ambiguous and it was not shown that any sums unpaid by the contractor were lienable claims against the property. *Slater v. Lich*..... 687
29. **APPEAL—REVIEW—HARMLESS ERROR.** It is harmless error to refuse to require plaintiffs, in an action for conversion, to elect whether they predicated their ownership on a sale, or upon ratification and estoppel, where the trial proceeded upon the latter theory, and no claim of surprise or motion for continuance was made, but the defendants offered evidence to rebut the plaintiffs' theory. *Maxwell v. Dimond* 30
30. **APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.** Error in not striking a deposition of a witness showing a sale of plaintiff's goods by defendant was harmless, where such sale was conceded on the trial by defendant. *Bickford v. Hupp*..... 427
31. **APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.** The admission of evidence in a malpractice case that defendant was negligent in not having X-ray photographs taken of the injury is harmless, where there is independent evidence tending to show negligence and the testimony would probably go only to the quantum of damages, affirmation of which was conditioned on remission of a part. *Cranford v. O'Shea*..... 508
32. **APPEAL—REVIEW—HARMLESS ERROR—REJECTION OF EVIDENCE.** In an action for personal injuries from stepping into a small hole near the edge of a sidewalk, it is harmless error to reject a photograph of the hole, where it simply showed a small shadow near the place where all the witnesses located the hole; since the photograph did not contradict any of the witnesses on any material fact, and being of no material aid, did not affect any substantial rights, within Rem. & Bal. Code, § 307, requiring such errors to be disregarded. *Kelly v. Spokane* 55
33. **SAME—FAILURE TO INSTRUCT.** Failure to instruct as requested that defendant in a malpractice case knew of the fracture of the femur, but could not heal it because of the synovitis of the knee joint and the condition of the fracture below the knee, was not prejudicial, where the case went to the jury after a long trial in which every feature of plaintiff's case as well as the defense was prominently and skillfully brought out. *Cranford v. O'Shea*..... 508
34. **APPEAL—REVIEW—HARMLESS ERROR.** Technical failure to instruct the jury that damages for personal injuries must be no more than compensatory, is harmless, where from the evidence it appears that they were no more than compensatory. *Perrault v. Emporium Department Store Co.*..... 578

ARREST—CONTINUED.

untarily surrendered, it is error, on the prisoner's application to the court for a return of the same, to order the prosecuting attorney to make the return. *State ex rel. Murphy v. Brown*..... 100

ASSAULT:

Conviction of lesser offense included in charge, see **INDICTMENT AND INFORMATION**.

ASSESSMENT:

Liability of stockholders to assessment on stock, see **CORPORATIONS**, 5-9.

Of compensation for property taken or injured for public use, see **EMINENT DOMAIN**, 7.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 6, 11-13.

Of tax, see **TAXATION**.

ASSIGNMENTS:

See **BILLS AND NOTES**, 3.

Default of garnishee after assignment of judgment, see **GARNISHMENT**.

By redemptioner from mortgage foreclosure sale, see **MORTGAGES**, 2, 3.

Of water right, see **WATERS AND WATER COURSES**, 6, 7.

ASSOCIATIONS:

See **BENEFICIAL ASSOCIATIONS**; **BUILDING AND LOAN ASSOCIATIONS**.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 5, 7, 8.

Of risk in crossing cable used in street construction work, see **MUNICIPAL CORPORATIONS**, 18.

ATTACHMENT:

Duty of officer to return property on dissolution of, see **SHERIFFS AND CONSTABLES**.

ATTORNEY AND CLIENT:

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 7.

AUTOMOBILES:

Collision with train, see **RAILROADS**, 2.

BANKS AND BANKING:

Enforcing stockholders' liability, see **CORPORATIONS**, 5-9.

1. **BANKS AND BANKING—STOCKHOLDERS—AGREEMENTS BETWEEN—SALE OF STOCK—CONDITIONS—PERFORMANCE OR BREACH.** Where the

BANKS AND BANKING—CONTINUED.

principal owners of a bank, which they were about to sell, purchased the stock of a minority stockholder for \$75 per share under an agreement to use their best efforts in settling up its affairs and to distribute to each share its proportion if more than \$75 was realized per share, the principal owners are not liable on the theory that they received \$106.05 per share, where it appears that they sold the bank at \$100 per share "made sound," that the sale did not include the real estate or securities not approved of, and they were compelled to take back the real estate and certain securities not considered of full book value, the assets had depreciated, and there was a wide margin between the actual and book value, diligent efforts had been made to realize upon all the assets, the assets having been administered in good faith, and it is not at all likely that \$75 per share will be realized by any one except the complaining minority stockholder who sold his stock, and who knew the situation and made no objections when statements were exhibited to him. *Ochs v. Green* 45

BAR:

Of prosecution by former acquittal, see **CRIMINAL LAW**, 1.
Of action by former adjudication, see **JUDGMENT**, 5, 6.
Of action by limitation, see **LIMITATION OF ACTIONS**.

BENEFICIAL ASSOCIATIONS:

1. **BENEFICIAL ASSOCIATIONS — FOREIGN CORPORATIONS — JURISDICTION OF COURTS—CANCELLATION OF CERTIFICATE.** The courts of this state have no jurisdiction to interfere with the internal affairs of a foreign beneficial association, by enjoining the officers of the society, at its headquarters in the state where it exists as a corporation, from taking action in the threatened cancellation of the certificate of a member of the society in this state, notwithstanding the society has an authorized agent in this state upon whom service of process can be made, under 3 Rem. & Bal. Code, § 6059-222. *Toibert v. Modern Woodmen of America*..... 287

BENEFITS:

Acceptance by city in completing contract for improvement, see **MUNICIPAL CORPORATIONS**, 7.
Assessment of property for benefits from public improvement, see **MUNICIPAL CORPORATIONS**, 11-13.

BEQUESTS:

See **WILLS**.

BIAS:

Of judge ground for change of venue, see **JUDGMENT**, 2; **VENUE**.
Of juror, see **JURY**.

BILLS AND NOTES:

Indorsement of credits on notes as tolling statute, see **LIMITATION OF ACTIONS**, 6.

Reformation of notes and mortgage, see **REFORMATION OF INSTRUMENTS**.

1. **BILLS AND NOTES—EXECUTION—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to establish that defendants signed certain notes, where they admitted the genuineness of their signatures, and the notes were filled out from standard printed forms in common use, with no evidence of irregularities, and the defendants were professional and business men of experience. *Metzger v. Sigall*. 80
2. **SAME—WANT OF CONSIDERATION—ACCOMMODATION MAKERS—BONA FIDE PURCHASERS.** The fact that makers of notes received no consideration, does not affect their liability, as they would be accommodation makers, under Rem. & Bal. Code, § 3420. *Metzger v. Sigall* 80
3. **SAME—TRANSFER—ASSIGNMENT FOR COLLECTION.** A holder for value may transfer title to notes by assignment for the purposes of collection. *Metzger v. Sigall*. 80
4. **SAME—HOLDER FOR VALUE.** The payee of a note accepting the same as evidence of an actual loan of money made for her by an indorser, who guaranteed payment, is a holder for value as against accommodation makers claiming no consideration. *Metzger v. Sigall* 80

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 2, 4.

BONDS:

Supersedeas on appeal, see **APPEAL AND ERROR**, 4.

Indemnity bonds, see **INDEMNITY**.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 21-23.

Sureties on bonds, see **PRINCIPAL AND SURETY**.

BOOKS:

Right to inspect corporate books, see **CORPORATIONS**, 1, 4.

BOUNDARIES:

Possession under mistake as to boundary line, see **ADVERSE POSSESSION**.

Stipulations in action of ejectment as reducing issue to one of restoring lost boundary, see **STIPULATIONS**, 2.

1. **BOUNDARIES—LOST LINES—ESTABLISHMENT—ACTIONS—SURVEY—PAROL EVIDENCE.** Where two deeds, executed at the same time, describe the dividing boundary line between the tracts conveyed by courses and distances, and there is no defect or patent or latent am-

BOUNDARIES—CONTINUED.

biguity in either description intimating that the lines would not coincide, if completed surveys were made, in an action reduced in its essence to restore the lost boundary, it is error to attempt to establish the location of the boundary line by oral evidence until after commissioners have been appointed under Rem. & Bal. Code, § 948, to make a survey and plat to restore the lost boundary, if it can be done; oral evidence being admissible only after it is found that, by a complete survey, the two descriptions of the boundary in dispute do not coincide. *Snell v. Stelling*..... 248

2. **BOUNDARIES — AGREED BOUNDARY LINES — ESTOPPEL.** Where adjoining landowners hired a surveyor to establish the line between them and accepted the survey, each building one-half of the line fence, and farmed their lands and made conveyances with reference to the fence as the true boundary for a period of twenty years, they are estopped to question the line upon its being found by a new survey that the first survey was erroneous. *Rose v. Fletcher*... 623

BREACH:

Of contract of sale, see **SALES**.

BRIBERY:

Search for and retention of effects on arrest of accused, see **ARREST**.

BRIDGES:

Franchise for construction of railroad bridges over streets, see **MUNICIPAL CORPORATIONS**, 14, 15.

Issuance of bridge bonds by city, see **MUNICIPAL CORPORATIONS**, 21-23.

BRIEFS:

On appeal, see **APPEAL AND ERROR**, 17, 18.

BROKERS:

1. **BROKERS—COMMISSIONS—EFFICIENT CAUSE—EVIDENCE—SUFFICIENCY.** Brokers are not entitled to commissions on a lease to customers originally found by them, but who were unable to meet the terms, where, after negotiations had ceased and the matter was abandoned, another agent took up the matter independently and effected a lease with such customers; since, of several brokers, the one whose effort was the efficient cause of the contract is entitled to the commissions. *Blackwood v. Ballard*..... 405

BUILDING AND LOAN ASSOCIATIONS:

Contracts of as commerce, see **COMMERCE**.

Control over by state auditor as exercise of judicial and legislative powers, see **CONSTITUTIONAL LAW**, 1.

Validity of act regulating, see **CONSTITUTIONAL LAW**, 1, 3, 4.

BUILDING AND LOAN ASSOCIATIONS—CONTINUED.

1. BUILDING AND LOAN ASSOCIATIONS—WHAT ARE—STATUTORY PROVISIONS. Where a foreign corporation is clearly a savings and loan association and has all the features of what is commonly known as a building and loan association, and its contracts are of the character of a savings and loan association, it is amenable to the "building and loan and savings and loan" act, 3 Rem. & Bal. Code, § 3601-1 *et seq.* *State v. Merrill*..... 8
2. BUILDING AND LOAN ASSOCIATIONS — OFFENSES—"AGENTS"—CRIMINAL RESPONSIBILITY. Where a representative of a foreign corporation was confessedly acting as the "correspondent" of the company in this state, selling shares and taking contracts in his own name, receiving a commission therefor, and transferring them to the persons purchasing them, and authorized to do so by the company, he was the "agent" of the company, within the meaning of 3 Rem. & Bal. Code, § 3601-27, making it a misdemeanor for an "agent" of such a company to willfully violate any of the provisions of such act, prohibiting such companies from doing business in the state. *State v. Merrill*..... 8
3. BUILDING AND LOAN ASSOCIATIONS — OFFENSES — DOING BUSINESS WITHOUT AUTHORITY—INFORMATION — SUFFICIENCY — STATUTORY PROVISIONS. An information charging the defendant, as an agent and employee, with conducting a savings and loan business in this state when the company he represented was not authorized to do business in this state, by then and there selling and knowingly causing to be sold and issued to one L. one certain contract and share of his said company, then and there being a foreign building and loan association not theretofore or then lawfully engaged in said business in this state, sufficiently states an offense under 3 Rem. & Bal. Code, § 3601-23, forbidding such companies from conducting the business of a savings and loan association in this state, and *Id.*, § 3601-27, providing that every agent or employee who shall willfully violate any of the provisions of the act shall be guilty of a misdemeanor; but it does not state an offense under *Id.*, § 3601-22 relating to the sale of "stock" of such an association while it did not have on deposit with the state auditor the required amount of securities; since the sale of "capital stock" was not charged, but only the sale of a contract certificate share, and the doing of business in this state without authority. *State v. Merrill*..... 8

BUILDING CONTRACTS:

See INDEMNITY.

Bonds for performance of, see PRINCIPAL AND SURETY.

BURDEN OF PROOF:

To show separate character of property, see HUSBAND AND WIFE, 2.

To show part payment within statutory period, see LIMITATION OF ACTIONS, 5.

To show release procured by fraud, see RELEASE.

BY-LAWS:

Of corporation, force and effect, see **CORPORATIONS**, 1.

CANCELLATION OF INSTRUMENTS:

Legal or equitable nature of action, see **ACTION**, 1.

Enjoining threatened cancellation of certificate by foreign beneficial association, see **BENEFICIAL ASSOCIATIONS**.

Rescission of contracts, see **VENDOR AND PURCHASER**, 1, 2.

1. **CANCELLATION OF INSTRUMENTS—FRAUD—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY.** Parties conveying away their realty for an inadequate consideration, in reliance upon the representations of a fellow countryman that there was danger of losing it, their object being to divest themselves temporarily with a view to protecting themselves against creditors, are entitled to a cancellation of the deed on refunding to the grantee his outlay occasioned in consequence of the transaction, with all accrued interest. *Dibert v. Petersen* 479

CARRIERS:

Shipment of intoxicating liquor into dry unit, see **INTOXICATING LIQUORS**.

1. **CARRIERS—INJURIES—LETTING OFF PASSENGERS—PROXIMATE CAUSE—OPEN DOOR—SUDDEN JERKS.** The opening, by the conductor, of the door of a pay-as-you-enter style of street car, just as the car was about to reach its stopping place, is an invitation to a passenger to pass out of the car or at least to enter the vestibule, where it appears that the passenger had started to get off at the last street, and upon being told that her destination was the next street, she stood near the door facing the conductor; and hence is the proximate cause of the accident, where she was thrown or fell out when the car started forward with a sudden jerk while the door was open and the car in motion. *Ferrell v. Washington Water Power Co.*.... 319
2. **CARRIERS—INJURIES TO PASSENGERS—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY.** There is no evidence to sustain a verdict for personal injuries sustained by a passenger in a street car, where two men each with his elbow upon the window sill of the car in which he was riding, had their arms broken while the cars were passing each other on a double track line, and the windows were guarded by iron bars, and when the cars were backed up, it was found that there was a clearance between them of thirteen inches, and undisputed physical facts showed that there could have been no collision of the cars; since oral evidence must give way to physical facts, and the passengers could only have met with such an accident by permitting their arms to extend through the bars and come in contact. *Mandel v. Washington Water Power Co.*..... 19

CAVEAT EMPTOR:

See **LANDLORD AND TENANT**, 4.

CERTIFICATE:

To proceedings or statement of facts, see **APPEAL AND ERROR**, 6, 10, 11.
Enjoining threatened cancellation of certificate by foreign beneficial association, see **BENEFICIAL ASSOCIATIONS**.

CERTIORARI:

Review of findings of commissioner of public lands, see **PUBLIC LANDS**.

1. **CERTIORARI — RECORD — SCOPE OF REVIEW — EVIDENCE—NECESSITY.**
Upon certiorari to review the decision of the commissioner of public lands ordering a cancellation of a state deed of oyster lands, in which the commissioner was unable to make a full return bringing up all the evidence, by reason of the stenographer's inability to read her notes, the decision of cancellation must be vacated, without prejudice; since Rem. & Bal. Code, § 1010, relating to review of certiorari proceedings depending on the facts alone, contemplates a review of the evidence upon the record below; and findings of the commissioner, cannot, in the absence of the evidence, be taken as the verdict of a jury. *Crouch v. Ross*..... 73

CHALLENGE:

To jurors in prosecution for "capital offense," see **CRIMINAL LAW**, 2.

CHANGE:

Of street grades, accrual of action, see **LIMITATION OF ACTIONS**, 2.
Of street grade, see **MUNICIPAL CORPORATIONS**, 8-10.
Of railroad grade crossings by city, see **RAILROADS**, 1.

CHANGE OF VENUE:

For bias of judge, see **JUDGMENT**, 2; **VENUE**.

CHARACTER:

Evidence as to character in civil actions, see **EVIDENCE**, 5.
Cross-examination of character witness, see **WITNESSES**, 1.

CHATTEL MORTGAGES:

Right of chattel mortgagees to sue for conversion, see **TROVER AND CONVERSION**, 3, 4.

1. **CHATTEL MORTGAGES — CONTRACT CREDITORS — DEFECTIVE REGISTRATION—PRIORITIES.** Where a chattel mortgage is a valid and subsisting lien as between the parties thereto, simple contract creditors who dealt with the mortgagor cannot urge a superior equity by reason of slight imperfections in the records of instruments resulting from a change of the name of the mortgagor from The Blackwell Hotel Company to Blackwell Hotel Company, unless they show that they were actually misled by reason of such imperfections. *Puget Sound Realty Associates v. Catlett*..... 495

CHATTEL MORTGAGES—CONTINUED.

2. **SAME—MISREPRESENTATIONS OF MORTGAGOR.** Representations by a mortgagor to creditors that his personal property is free from lien are not binding on the mortgagee when not authorized by him. *Puget Sound Realty Associates v. Catlett*..... 495
3. **CHATTEL MORTGAGES—FORECLOSURE BEFORE MATURITY OF DEBT—REASONABLE CAUSE.** Reasonable cause to believe that mortgaged horses and farm machinery will be lost or removed, justifying immediate action for the recovery of the debt under the provisions of Rem. & Bal. Code, § 1111, is not shown by the fact that the mortgagee believed that the property might be stolen and removed by members of a family in the neighborhood, his suspicions being based only upon gossip, rumor, and hearsay and general reputation of the community for horse and cattle stealing, where it appears that the mortgagee, at the time of the execution of the mortgage, had knowledge of the reputation of the neighborhood and of the intention of the mortgagors to pasture the horses upon the neighborhood range; that there had been no change in conditions and reputation of the neighborhood as to horse and cattle stealing; and that the mortgagors had done nothing themselves to impair the safety of the property at any time. *Fitch v. Goetjen*..... 355

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

See **INDIANS**.

Privileges and immunities, see **CONSTITUTIONAL LAW**, 3.

Equal protection of laws, see **CONSTITUTIONAL LAW**, 4.

CIVIL SERVICE:

See **MUNICIPAL CORPORATIONS**, 4.

CLAIMS:

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

Against city, see **MUNICIPAL CORPORATIONS**, 24, 25.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**, 3.

COLLATERAL AGREEMENT:

Parol evidence, see **EVIDENCE**, 6.

COLLATERAL ATTACK:

On judgment, see **JUDGMENT**, 3, 4.

COLLECTION:

Transfer of title to note for purpose of collection, see **BILLS AND NOTES**, 3.

COLLISION:

Between automobile and train, see **RAILROADS**, 2.

COLOR OF TITLE:

To sustain adverse possession, see **ADVERSE POSSESSION**.

COMMENT:

On evidence, see **CRIMINAL LAW**, 3, 6.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.

1. **COMMERCE—WHAT CONSTITUTES—CONTRACTS OF SAVINGS AND LOAN ASSOCIATIONS.** The usual contracts of foreign savings and loan associations are not interstate nor foreign commerce, and when delivered, become local transactions, subject to and governed by the local law; hence the savings and loan association act is not a burden upon interstate commerce. *State v. Merrill*..... 8

COMMISSIONS:

Of broker, see **BROKERS**.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**.

Gifts of to wife, see **GIFTS**, 3-5.

Disposition of by will, see **WILLS**, 1.

COMPENSATION:

Of broker, see **BROKERS**.

For performance of contract, see **CONTRACTS**, 2, 3.

For property taken or damaged for public use, see **EMINENT DOMAIN**, 4, 6-11.

COMPETENCY:

Of evidence in civil actions, see **EVIDENCE**, 5, 6.

Of jurors, see **JURY**.

COMPLAINT:

In criminal prosecutions, see **INDICTMENT AND INFORMATION**.

In civil actions, see **PLEADING**.

COMPROMISE AND SETTLEMENT:

Of claim for personal injuries, see **RELEASE**.

1. **COMPROMISE AND SETTLEMENT—EVIDENCE—QUESTION FOR JURY.** In an action to recover the value of certain goods alleged as converted by defendant to his own use, in which the defendant set up a compromise and settlement, a question for the jury was presented where defendant claimed the settlement covered payment for the goods and plaintiff testified that the money paid him by defendant was

COMPROMISE AND SETTLEMENT—CONTINUED.

merely for the contract price of certain construction work and that the goods were not taken into consideration in the settlement. *Bickford v. Hupp*..... 427

COMPUTATION:

Of period of limitation, see **LIMITATION OF ACTIONS**, 2.

CONCLUSIVENESS:

Of decision on former appeal, see **APPEAL AND ERROR**, 39-42.

Of decree of general distribution, see **CONSTITUTIONAL LAW**, 5.

Of decree of final distribution, see **EXECUTORS AND ADMINISTRATORS**, 3, 5, 6.

Of judgment, see **JUDGMENT**, 4-6.

Of finding of necessity for filling lowlands, see **MUNICIPAL CORPORATIONS**, 12.

CONDEMNATION:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITION:

Precedent to time for payment of sum retained under contract as indemnity, see **INDEMNITY**.

Precedent to foreclosure of lien, see **MECHANICS' LIENS**.

Precedent to issuance of bridge bonds, see **MUNICIPAL CORPORATIONS**, 21.

CONDITIONAL SALES:

See **SALES**, 6.

CONDUCT:

Of judge or counsel at criminal prosecution, see **CRIMINAL LAW**, 3, 4, 6, 7.

CONSIDERATION:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 2, 4.

Want of, ground for cancellation of deed, see **CANCELLATION OF INSTRUMENTS**.

Of contract, see **CONTRACTS**, 3.

Admissibility of parol evidence to show, see **EVIDENCE**, 6.

CONSTITUTIONAL LAW:

Failure to notify property owners of condemnation proceedings as taking of property without due process of law, see **MUNICIPAL CORPORATIONS**, 6.

Amendment of statutes, see **STATUTES**.

Privilege of witness, see **WITNESSES**, 2, 3.

1. **CONSTITUTIONAL LAW—POWERS—DELEGATION OF JUDICIAL AND LEGISLATIVE POWERS—STATE AUDITOR—CONTROL OVER BUILDING AND LOAN**

CONSTITUTIONAL LAW—CONTINUED.

- ASSOCIATIONS. Building and loan and savings and loan associations, being in their nature public associations doing business with the public, and subject to the control of the legislature, the state auditor may be empowered to examine and audit their accounts and in connection therewith perform such other duties as are necessary to a full and fair control of their business; hence 3 Rem. & Bal. Code, § 3601-1 *et seq.*, containing such provisions, is not unlawful delegation of judicial and legislative powers to the state auditor, and does not violate Const., art. 3, § 20, providing that the state auditor shall be auditor of public accounts, and shall have such other powers and perform such other duties "in connection therewith" as may be prescribed by law. *State v. Merrill*. 8
2. CONSTITUTIONAL LAW—POLICE POWERS—DELEGATION. Const., art. 11, § 11, authorizing cities to make and enforce within their limits all such . . . police . . . and other regulations as are not in conflict with the general laws is a direct delegation of the police power, as ample within its limits as that possessed by the legislature. *Detamore v. Hindley*. 322
3. CONSTITUTIONAL LAW—CLASS LEGISLATION—BUILDING AND LOAN ASSOCIATIONS—REGULATION. The building and loan and savings and loan association act, 3 Rem. & Bal. Code, § 3601-1 *et seq.*, is not void as class legislation in that it makes it a crime for any person within the state to sell stock of such associations, while the stock of other associations may be sold, since it does not discriminate against corporations authorized to do business in this state. *State v. Merrill*. 8
4. CONSTITUTIONAL LAW—DUE PROCESS — DISCRIMINATION — REGULATION OF FOREIGN CORPORATIONS. Since a foreign corporation has no legal existence beyond the limits of its home state, except as expressly granted to it by the laws of another state, the exclusion of foreign building and loan and savings and loan associations from doing business in this state is not in violation of the due process of law, denial of equal protection, and unlawful discrimination clauses of the Federal constitution. *State v. Merrill*. 8
5. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF SERVICE—APPEARANCE. A decree of general distribution invoked by the executor of a nonintervention will, and entered in probate upon notice to a guardian *ad litem* conformably to the statute and to the order of court, to which the guardian personally appeared in the action, is upon due process of law and conclusive the same as any other judgment. *Bayer v. Bayer*. 430

CONSTRUCTION:

Of statute providing for challenges to jurors, see CRIMINAL LAW, 2.
Of deeds, see DEEDS.

CONSTRUCTION—CONTINUED.

- Of mortgage, see EVIDENCE, 7; MORTGAGES, 1.
- Of indemnity bond, see INDEMNITY.
- Of contract, see SALES, 1.
- Of will, see WILLS, 5.

CONTEST:

- Of will, see WILLS, 4.

CONTRACTS:

- See BILLS AND NOTES; BUILDING AND LOAN ASSOCIATIONS; DEEDS; INDEMNITY; INSURANCE; SALES; WORK AND LABOR.
 - Cancellation of, legal or equitable nature of action, see ACTION, 1.
 - Agreement by principal owners to sell stock of bank and make distribution to stockholders, see BANKS AND BANKING.
 - Cancellation, see CANCELLATION OF INSTRUMENTS.
 - Of savings and loan associations as commerce, see COMMERCE.
 - Election of remedy by vendor, see ELECTION OF REMEDIES.
 - Agreements within statute of frauds, see FRAUDS, STATUTE OF.
 - Leases, see LANDLORD AND TENANT.
 - For public improvements, see MUNICIPAL CORPORATIONS, 5.
 - Suretyship, see PRINCIPAL AND SURETY.
 - Reformation, see REFORMATION OF INSTRUMENTS.
 - Releasing claim for personal injuries, see RELEASE.
 - Stipulation in actions, see STIPULATIONS.
 - As affecting right to subrogation, see SUBROGATION.
 - Sales of realty, see VENDOR AND PURCHASER.
 - For water, see WATERS AND WATER COURSES, 3-5
1. **CONTRACTS — TERMS — EVIDENCE — ADMISSIBILITY.** Where the evidence as to the terms of an oral contract is conflicting, evidence of the value of the work contracted for is admissible as circumstantial evidence bearing on the contention of the parties. *Pettett v. Johnston* 663
 2. **CONTRACTS—EXTRA WORK—REASONABLE PRICE — EVIDENCE—SUFFICIENCY.** In an action by a subcontractor to recover the reasonable cost of grubbing in road construction work, on the principal contractor's promise to pay therefor, in which the evidence varied from \$65 to \$263.97 per acre, the contract price of the principal contractor, who knew the prices at which such work could be profitably done, to do the work at \$110 per acre, is a fair basis upon which to establish the reasonable value of the work. *Zindorf v. Tillotson* 472
 3. **CONTRACTS — MODIFICATION — PROMISE OF EXTRA COMPENSATION — CONSIDERATION.** Although a subcontractor has contracted to do the grubbing as a part of the excavation in highway construction, the contractor's subsequent promise to pay additional compensation for excess grubbing is based upon a valid consideration, when the con-

CONTRACTS—CONTINUED.

tract had been made with the understanding that the grubbing would not exceed a certain amount and on discovery of the discrepancy the contractor requested his subcontractor to complete the grubbing and agreed to pay the reasonable value thereof. *Zindorf v. Tillotson* 472

CONTRADICTION:

Sheriff's return of substituted service of process, see **PROCESS**.

CONTRIBUTORY NEGLIGENCE:

See **DEATH**.

Of servant, see **MASTER AND SERVANT**, 5, 8.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 17, 20.

Of person injured on or near railroad tracks, see **RAILROADS**, 2.

CONVERSION:

Wrongful conversion of personal property, see **TROVER AND CONVERSION**.

CONVEYANCES:

See **CHATTEL MORTGAGES; DEEDS; MORTGAGES**.

Devisees, see **WILLS**, 1-3.

CORPORATIONS:

See **BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; MUNICIPAL CORPORATIONS**.

Regulation of foreign building and loan companies as denial of due process of law, see **CONSTITUTIONAL LAW**, 4.

Acquisition of property by condemnation, see **EMINENT DOMAIN**.

Water companies, inadequate service, see **WATERS AND WATER COURSES**, 3-5.

Irrigation companies, see **WATERS AND WATER COURSES**, 6-9.

1. **CORPORATIONS—BY-LAWS—FORCE AND EFFECT.** A by-law of a title and abstract corporation providing that each stockholder shall have the right to inspect the books and records of the company at any time during business hours, has all the force and effect of a statute to the same effect. *State ex rel. Gwinn v. Bucklin* 23
2. **CORPORATIONS—STOCK — STOCK DIVIDENDS—LEGALITY.** Stock dividends, by increasing the capital stock of a corporation and issuing the increase to its stockholders, are lawful, where the same are in good faith and the company's assets exceed its debts and the amount of the capital stock, including the increase so distributed. *Northern Bank & Trust Co. v. Day* 296
3. **SAME—LEGALITY OF STOCK DIVIDENDS—EVIDENCE OF GOOD FAITH—SUFFICIENCY.** Such stock dividends are not shown to be in bad faith, by reason of the failure of the company a year and a half later,

CORPORATIONS—CONTINUED.

where the company at the time was doing a good business, and was in good condition, there was need of increasing the capital stock, persons acquainted with its affairs and business invested in the stock, and there was nothing to indicate that the stockholders were not honest in the belief that the undivided profits exceeded the par value of that portion of the increase which was distributed as a stock dividend. *Northern Bank & Trust Co. v. Day*..... 296

4. CORPORATIONS—STOCKHOLDERS—RIGHTS—INSPECTION OF BOOKS—MOTIVES. The right of inspection of corporate books, given to stockholders of a title and abstract corporation, cannot be withheld by the corporation on the ground that the only purpose of such inspection was to secure a knowledge of the company's customers and prices, which such stockholders desired to use in aid of a rival abstract company belonging to such stockholders, and to the injury of the business of the corporation. *State ex rel. Gwinn v. Bucklin*.... 23
5. CORPORATIONS—STOCK SUBSCRIPTIONS—ASSESSMENT—DETERMINATION—RES JUDICATA. Where the validity of claims against an insolvent bank is determined in the matter of the receivership, upon notice to stockholders in proceedings to assess their stock, without any appeal taken, it cannot be litigated in a subsequent action against the stockholders. *Silvain v. Benson*..... 271
6. SAME—ASSESSMENT OF STOCK—ACTIONS—DEFENSES. In an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank to which no certificate had been issued because all of its stock had not been subscribed, it is no defense that the subscriptions were invalid or that the organization had not been completed. *Silvain v. Benson*..... 271
7. SAME. Such a defense could not be made where the court had regularly determined the amount of the debts and subscriptions and authorized an assessment and no appeal therefrom had been taken. *Silvain v. Benson*..... 271
8. SAME—STOCK SUBSCRIPTION—ACTIONS—DEFENSES—ESTOPPEL. In an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank, it is no defense in favor of certain stockholders that they signed the subscription list without specifying the amount for which they subscribed, and that the amounts were thereafter written in without authority by the promoter; as they are estopped. *Silvain v. Benson*..... 271
9. SAME—VALIDITY OF SIGNATURE. It is good defense to an action for the benefit of creditors upon the unpaid stock subscriptions of an insolvent bank that the subscription list was not signed by the defendant, or by any one authorized to sign for him. *Silvain v. Benson* 271

COSTS:

Condemnation proceedings, see EMINENT DOMAIN, 4.

Estimate of cost of local improvement, see MUNICIPAL CORPORATIONS, 11.

1. COSTS—ALLOWANCE ON CROSS-APPEALS. Where both parties appeal and neither prevails, costs will not be allowed in the appellate court. *Berg v. Yakima Valley Canal Co.*..... 451

COUNCIL:

See MUNICIPAL CORPORATIONS, 1, 2, 5.

COUNTIES:

Effect of statute of limitations on tax title held by county, see LIMITATION OF ACTIONS, 3.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.

Jurisdiction over foreign beneficial association, see BENEFICIAL ASSOCIATIONS.

Jurisdiction in divorce proceedings, see DIVORCE, 3, 4.

Condemnation proceedings, see EMINENT DOMAIN.

Judicial notice, see EVIDENCE, 1-3.

Jurisdiction in probate, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Vacation of judgment, see JUDGMENT, 4.

Inquiry as to regularity in passage of ordinance, see MUNICIPAL CORPORATIONS, 2.

Trial by court without jury, findings, see TRIAL, 2.

1. COURTS—RULE OF DECISION—FEDERAL QUESTIONS. State courts are required to follow the construction placed upon an act of Congress by the Federal courts. *Lauer v. Northern Pac. R. Co.*..... 465

CREDITORS:

Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES, 1, 2.

Remedy against surety, see PRINCIPAL AND SURETY.

Vendor in conditional sale as preferred creditor, see SALES, 6.

Subrogation to indemnity given to surety by principal debtor, see SUBROGATION.

CRIMINAL LAW:

See NUISANCE; PERJURY.

Arrest of accused, see ARREST.

Violation of building and loan association act, see BUILDING AND LOAN ASSOCIATIONS.

Sale or gift of liquor to Indians, see INDIANS.

Indictment, information, or complaint, see INDICTMENT AND INFORMATION.

CRIMINAL LAW—CONTINUED.

Violation of liquor laws, see INTOXICATING LIQUORS.

Competency of juror, see JURY.

Examination of witness, see WITNESSES, 1, 2.

1. CRIMINAL LAW—FORMER JEOPARDY—OFFENSE UNDER FEDERAL AND STATE LAWS. Where an offense is created under both Federal and state laws, an acquittal in the court of one jurisdiction does not bar a prosecution in the other for the same transaction. *State v. Kenney* 441
2. CRIMINAL LAW—TRIAL—SELECTION OF JURY—NUMBER OF CHALLENGES—"CAPITAL OFFENSES"—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2138, providing that, in prosecutions for capital offenses, the defendant may challenge peremptorily twelve jurors, and six jurors in prosecutions for offenses punishable by imprisonment in the penitentiary, "capital offenses" refers only to those punishable by death; and the death penalty having been abolished, the right to twelve peremptory challenges is suspended; and the fact that the crime was committed prior to the abolishment of the death penalty is immaterial, where the accused was not insisting on the application of the capital penalty. *State v. Johnston*..... 1
3. CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. It is misconduct constituting a comment on the evidence, within the prohibition of Const., art. 4, § 16, for a judge, in a criminal action, to so examine a witness essential to the defense as to suggest a doubt as to the integrity of the witness. *State v. Jackson* 514
4. CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTION—INCRIMINATING EVIDENCE—DEMAND FOR PRODUCTION. Under the Federal and state constitutions providing that no person in any criminal case shall be compelled to be a witness against himself, a demand upon defendant, in the presence of court and jury, to produce documents which will tend to criminate him, invades the defendant's constitutional grant of immunity, and hence constitutes reversible error. *State v. Jackson* 514
5. CRIMINAL LAW—TRIAL—JOINDER OF DEFENDANTS—VERDICT—CONSISTENCY. Upon a joint information for grand larceny, evidence that one of the accused took from the person of the prosecuting witness at least \$24.70, and other evidence that he took \$34.70 and gave \$10 of it to his codefendant, warrants a verdict of guilty as to such defendant, although his codefendant was acquitted; since his guilt is not inconsistent with the innocence of his codefendant. *State v. Haynes* 660
6. SAME—APPEAL—EXCEPTIONS—COMMENT ON EVIDENCE. The action of the court in commenting on the facts in a criminal case, by so questioning a witness as to convey to a jury doubt as to her integrity, being an invasion of the constitutional rights of the accused prohib-

CRIMINAL LAW—CONTINUED.

iting the judge from commenting on the facts, may be reviewed on appeal although no exceptions were interposed at the time; such conduct constituting neither a "ruling" or "decision," within Rem. & Bal. Code, § 381, requiring exceptions. *State v. Jackson*..... 514

7. **SAME—APPEAL—PRESERVATION OF GROUNDS—MISCONDUCT OF COUNSEL—RECORD—WAIVER OF ERROR.** Error in misconduct of the prosecuting attorney in his argument to the jury cannot be urged where the only foundation laid was exceptions to the alleged use of certain language, it was not claimed that the misconduct was so flagrant that it could not be cured by instructions, no instructions were requested, and the offending language was not preserved in the record. *State v. Johnston*..... 1
8. **CRIMINAL LAW—PUNISHMENT—EXCESSIVE SENTENCE.** A sentence of two years in the state penitentiary for giving intoxicating liquor to an Indian of mixed blood, being within the limit fixed by law, will be presumed to be not an abuse of discretion, in the absence of any showing to the contrary. *State v. Kenney*..... 441

CROPS:

Damages for loss of growing crop, see **DAMAGES**, 5.

Renting on shares, see **LANDLORD AND TENANT**, 1, 2.

Damages to by obstruction of stream, see **WATERS AND WATER COURSES**, 1, 2.

CROSS-APPEALS:

Allowance of costs on, see **COSTS**.

CROSS-EXAMINATION:

See **WITNESSES**, 1.

CROSSINGS:

Power of city to change grade crossings, see **RAILROADS**, 1.

Accident at railroad crossing, see **RAILROADS**, 2.

CUSTODY:

Of insane person, liability for torts of, see **INSANE PERSONS**, 5, 6.

DAMAGES:

Harmless error in allowance of, see **APPEAL AND ERROR**, 38.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 4, 6-11.

Torts of insane person, see **INSANE PERSONS**.

For wrongful eviction, see **LANDLORD AND TENANT**, 8.

Injuries caused by public improvements, see **MUNICIPAL CORPORATIONS**, 8-10, 13.

For malpractice, see **PHYSICIANS AND SURGEONS**, 2.

To crops from obstructing stream, see **WATERS AND WATER COURSES**, 1, 2.

DAMAGES—CONTINUED.

1. **DAMAGES—PERSONAL INJURIES—MENTAL ANGUISH—INSTRUCTIONS.**
In an action for personal injuries from a blow on the head, resulting in pain, nervousness, and headaches, it is not proper to instruct, upon the subject of damages, that the jury may take into consideration the probable suffering of mental anguish in the future, where there was no evidence tending to show mental anguish other than pain and suffering actually incident to such an injury. *Bennett v. Oregon-Washington Railroad & Navigation Co.*..... 64
2. **SAME—PROBABLE FUTURE SUFFERING—REASONABLE CERTAINTY.**
Damages for future pain and suffering should only be granted when the jury can find from a preponderance of the evidence that future pain and suffering is reasonably certain to result from the injuries and continue in the future. *Bennett v. Oregon-Washington Railroad & Navigation Co.*..... 64
3. **DAMAGES—PERSONAL INJURIES—EVIDENCE—EARNING CAPACITY—PROSPECTIVE PROFITS—ADMISSIBILITY.** In an action for personal injuries sustained by a woman who was selling hair goods, evidence that she contemplated opening a place for the sale of hair goods, is competent on an issue as to her loss of earning capacity, as tending to show her ability to work and transact business, and is not objectionable as showing anticipated profits, where no specific statement was made as to amount of anticipated profits lost. *Pierce v. Seattle Electric Co.*..... 141
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$11,500 for personal injuries is excessive, and should be reduced to \$8,000, where it appears that the plaintiff was a young man employed as a common laborer, and had never received over \$2 per day for his work; that, at the time of trial, he was engaged in light work at a wage of \$45 per month; that his injuries consisted in the dislocation of several vertebrae which in healing had united and caused some stiffness in the back, that his leg had been shortened about three-fourths of an inch by reason of a broken ankle, that he was in good shape considering the injury, and that, while the condition in which he was left was permanent, it would never get worse. *Olson v. Carlson.*..... 415
5. **DAMAGES—EXCESSIVENESS—LOSS OF GROWING CROP.** A judgment for \$18,500, for damages as the result of the loss of nursery stock cannot be regarded as excessive, where the plaintiff's evidence of the value of the nursery stock in its condition at the time of its loss by reason of failure to receive water was uncontroverted; in view of the proper measure of damages for the loss of a growing crop being either its value at the time of the loss, or the market value at the time of maturity, less the cost of tilling, harvesting and marketing. *Berg v. Yakima Valley Canal Co.*..... 451

DEATH:

Of employee from loss of control of rowboat, see **MASTER AND SERVANT**, 2-4, 7.

1. **DEATH—WRONGFUL DEATH—NEGLIGENCE—TRESPASSERS—DEGREE OF CARE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** One who goes upon a trestle used in the construction of a jetty, in search of employment, and after being refused, loiters about the place in a dangerous position for an inexcusable length of time near the sweep of a derrick used in unloading rock from a heavy skip, is a mere trespasser, or at least but a licensee, whom the defendant was only bound to refrain from willfully and wantonly injuring; and he was guilty of contributory negligence, precluding any recovery for his death, when struck by the skip, where there was no evidence of an intention to wantonly or willfully injure him, or even that his presence was known. *Kroeger v. Grays Harbor Construction Co.*... 68

DEBT:

See **LIMITATION OF ACTIONS**, 5-7.

Property exempt from payment of, see **EXECUTORS AND ADMINISTRATORS**, 1, 2; **EXEMPTIONS**.

Option to declare debt due for default of mortgagors, see **MORTGAGES**, 1.

DECEDENTS:

Reputation of deceased party, see **EVIDENCE**, 5.

Estates, see **EXECUTORS AND ADMINISTRATORS**.

DECISION:

On appeal as law of case, see **APPEAL AND ERROR**, 39-42.

Rule of decision, see **COURTS**.

DEEDS:

Cancellation, see **CANCELLATION OF INSTRUMENTS**.

Estoppel by deed, see **ESTOPPEL**.

1. **DEEDS — CONSTRUCTION — EXCEPTIONS AND RESERVATIONS—SCOPE—FEE EXCEPTED FROM RIGHT OF WAY EASEMENT.** Where an easement for a right of way had been granted to a railroad reserving the fee simple to the grantors, and the railroad went into possession, a subsequent deed of the entire tract, "reserving and excepting" "a strip of land" describing the same by reference to the right of way deed, did not convey the fee reserved in the railroad right of way deed; as the reservation therein referred to the grantor's fee in the right of way. *Studebaker v. Beek*..... 260
2. **SAME.** Where, after granting a railroad right of way easement, excepting and reserving the fee, the grantors conveyed a tract to the company for a depot site upon a condition that was never performed, a deed from the railroad company reconveying the depot

DEEDS—CONTINUED.

site for nonperformance of condition, but excepting and reserving the right of way described by reference to the original right of way deed, reinvested the original grantors with all their title at the time the depot site was first conveyed, including the fee simple in the railroad right of way, as originally excepted; and the company could not thereafter convey the fee of that strip, upon abandonment of its right of way. *Studebaker v. Beek*..... 260

3. **SAME—RESERVATIONS AND EXCEPTIONS—CONSTRUCTION.** A reservation in a deed by a grantor of the fee in a strip of land to which the grantor never had legal title, does not in equity reserve anything; while the reservation in the same words by a grantor who had both the legal and equitable title to the fee will effectually reserve the same, as the relation of the parties to the subject-matter is different, and the equities of all the parties must be considered. *Studebaker v. Beek* 260
4. **DEEDS — CONSTRUCTION — RESERVATIONS AND EXCEPTIONS.** While there is a technical legal distinction between an exception and a reservation, they may be used as synonymous, if necessary to effectuate the intention of the parties; and ambiguity created by the use of both expressions should be resolved by reference to the nature of the thing reserved or excepted. *Studebaker v. Beek* 260

DEFAULT:

Of garnishee, see **GARNISHMENT**.

Judgment by, vacation, see **JUDGMENT**, 3.

Option to declare debt due for default of mortgagors, see **MORTGAGES**, 1.

DEFECT:

In leased premises, liability of landlord, see **LANDLORD AND TENANT**, 4.

In appliances used by servant, see **MASTER AND SERVANT**, 1-4.

In sidewalk, see **MUNICIPAL CORPORATIONS**, 20.

DEGREES:

Conviction of lesser degree of offense, see **INDICTMENT AND INFORMATION**.

Of offense, see **PERJURY**.

DELAY:

Laches, see **EQUITY**.

DELEGATION:

Of legislative and judicial powers, see **CONSTITUTIONAL LAW**, 1.

Of police power to cities, see **CONSTITUTIONAL LAW**, 2.

DELIVERY:

Of gift, see GIFTS.

Of liquor in dry unit, see INTOXICATING LIQUORS.

Of contract for sale of land, see VENDOR AND PURCHASER, 3, 4.

DEMAND:

For production of incriminating evidence, see CRIMINAL LAW, 4.

For restoration of premises, see LANDLORD AND TENANT, 5.

Refusal of demand for return of property, see TROVER AND CONVERSION, 2.

DEMURRER:

In pleading, see PLEADING.

DENIALS:

In pleading on insurance policy, see INSURANCE, 2.

DESCRIPTION:

Of injuries in notice of claim against city, see MUNICIPAL CORPORATIONS, 25.

DEVISES:

See WILLS.

DIRECTING VERDICT:

In civil actions, see TRIAL, 3.

DISCHARGE:

From indebtedness, see COMPROMISE AND SETTLEMENT.

Of insane person from hospital, see INSANE PERSONS.

Of claim for personal injuries, see RELEASE.

DISCRETION:

Of superintendent of hospital in discharging insane person, see INSANE PERSONS, 1, 3.

Of public service commission to order termination of water contracts, see WATERS AND WATER COURSES, 4, 5.

DISCRETION OF COURT:

Review of discretion in granting new trial, see APPEAL AND ERROR, 23.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 12, 16-18.

DISSOLUTION:

Of attachment, return of property to defendant, see SHERIFFS AND CONSTABLES.

DISTRIBUTION:

Decree of, see CONSTITUTIONAL LAW, 5; EXECUTORS AND ADMINISTRATORS, 3, 5, 6.

DIVIDENDS:

Legality of stock dividends, see CORPORATIONS, 2, 3.

DIVORCE:

Scope of appeal from order allowing suit money pending appeal, see APPEAL AND ERROR, 19.

1. **DIVORCE—GROUNDS—ABANDONMENT—JUSTIFICATION.** A husband is not entitled to a judgment of divorce on the ground of abandonment on evidence that he and his wife had lived separate and apart for a few years, where it appears that the wife, while objecting to a divorce, had sufficient cause in living apart from the fact that the husband had taken up with another woman whom he wished to marry, and with whom he sustained illicit relations; since the abandonment must be voluntary and without justification; nor would abandonment be shown by refusing a reconciliation which was not offered in good faith. *Maloney v. Maloney*..... 656
2. **SAME—INABILITY TO LIVE TOGETHER.** The fact that a husband and wife have hopelessly drifted apart and can no longer live together as man and wife, is not ground for granting a divorce to the husband, where the conditions were due solely to his wrongful acts. *Maloney v. Maloney*..... 656
3. **DIVORCE—ALIMONY AND SUIT MONEY PENDING APPEAL—JURISDICTION.** The superior court retains jurisdiction, after judgment in divorce actions, for the purpose of allowing suit money, attorney's fees and alimony pending appeal; in view of Rem. & Bal. Code, § 988, giving the court power to make such orders relative to expense so as to insure efficient preparation of the wife's case, and Id., § 1731, providing that on appeal the superior court shall retain jurisdiction for certain specified purposes, and "for all purposes in so far as the cause is not affected by the appeal;" especially in view of the rule that the supreme court is without jurisdiction to hear such applications pending the appeal. *Lewis v. Lewis*..... 671
4. **DIVORCE—DECREE—MODIFICATION — JURISDICTION.** In divorce, the jurisdiction is continuing, especially where the interests of children are concerned, and the decree may be modified without the necessity for new process. *Cooper v. Cooper*..... 85

DOCUMENTS:

Demand for incriminating evidence, see CRIMINAL LAW, 4.
Production of by witness, see WITNESSES, 3.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 4, 5.

Failure to serve notice of condemnation proceedings as taking of property without due process of law, see MUNICIPAL CORPORATIONS, 6.

EARNING CAPACITY:

Evidence of loss of, see DAMAGES, 3.

EJECTMENT:

Effect of stipulations, see STIPULATIONS, 2.

ELECTION:

Harmless error in refusing to require election of theory of case, see APPEAL AND ERROR, 29.

ELECTION OF REMEDIES:

1. ELECTION OF REMEDIES—INCONSISTENT REMEDIES—SALES CONTRACT. A vendor, having adopted the theory of an executed sale and sued for the price due, cannot recover for loss of profits on the theory of a breach by the vendee of an executory contract of sale. *North Idaho Grain Co. v. Callison*..... 212

ELECTIONS:

For issue of bonds, see MUNICIPAL CORPORATIONS, 23.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 6, 13.

Tax lien, when attaches, see TAXATION.

1. EMINENT DOMAIN—PUBLIC USE—LOGGING RAILROAD. A logging railroad is entitled to exercise the right of eminent domain to condemn lands for right of way on a showing of a large supply of timber tributary to the road, since the bringing of this timber to mill or market would constitute a public use regardless of the extent of the use. *State ex rel. Clear Lake Logging R. Co. v. Superior Court* 445
2. SAME—PRIVATE INTEREST OF LUMBER COMPANY—EFFECT. The interest of the stockholders of a lumber company in a logging railroad is no objection to condemnation proceedings by the railroad company, since the latter is a public service corporation bound to give reasonable service to the public and is amenable to control by the public authorities. *State ex rel. Clear Lake Logging R. Co. v. Superior Court* 445
3. SAME—SELECTION OF ROUTE—NECESSITY OF TAKING—REVIEW. The choice by a logging railroad of a route across respondent's lands as the most feasible and practicable will not be controlled by the

EMINENT DOMAIN—CONTINUED.

courts because it may interfere with respondent's contemplated use of a portion of the land for a mill site, when there is no sufficient showing that the land sought is not reasonably necessary, and it was not convincingly shown that a slight change of location would meet the necessity of the taker and cause less damage to the owner; the availability for the owner's special purpose being an element to be considered in estimating damages, and not as defeating the right of condemnation. *State ex rel. Clear Lake Logging R. Co. v. Superior Court* 445

4. EMINENT DOMAIN—COMPENSATION—PREPAYMENT—DAMAGES—APPEAL—COSTS. Under Const., art. 1, § 16, prohibiting the taking of private property without just compensation being first made or paid into court, the costs of an appeal, successfully prosecuted by the petitioner from an order denying a public use, which was reversed, cannot be taxed against the landowner; since the proceedings to review the order was a necessary part of the petitioner's proceedings to take the land, which the petitioner is required to pay before the taking. *State ex rel. Clear Lake Logging R. Co. v. Superior Court* 445
5. EMINENT DOMAIN—PROCEEDINGS—NECESSARY PARTIES DEFENDANT. In proceedings by a city to condemn the property of a railroad company, which was in the hands of receivers, the receivers are necessary parties defendant. *Seattle v. Seattle, Renton & Southern R. Co.* 94
6. SAME—PROCEEDINGS—LIMITATION OF USE—ISSUES AND PROOF—DAMAGES—DECREE. In proceedings by a city to condemn part of the right of way of a railroad company in order to secure a joint use, in which verdicts for damages were awarded for such joint use only, judgment cannot be entered granting to the city the fee of the property condemned. *Seattle v. Seattle, Renton & Southern R. Co.*... 94
7. SAME—ASSESSING DAMAGES—SEPARATE TRIALS AS TO SEPARATE TRACTS. In proceedings by a city to condemn part of the right of way of a railroad company for a distance of several miles, but of varying widths, described by metes and bounds by various descriptions, dividing the property into various zones, the city is not entitled to try out the issue of damages on each description or zone, and have various verdicts rendered thereon, but the damages must be determined as a whole, and not by piecemeal; and it is immaterial that as to some of the zones it is claimed that the city's rights are determined by deeds, franchises, and prior litigation; since the questions of such rights and title are not to be submitted to the jury. *Seattle v. Seattle, Renton & Southern R. Co.*..... 94
8. SAME—DAMAGES—MEASURE OF DAMAGES. Upon the condemnation of railway property, in determining the damages because of a five

EMINENT DOMAIN—CONTINUED.

- per cent grade adjacent to its terminal and shops, the measure of damages is such sum as would enable the railway company to readjust itself to the new grade, so that it would occupy the same relative position to the proposed grade as it does to the present grade; and not the amount necessary to readjust the tracks into the shops on a five per cent grade, the cost of retaining walls, and estimated insurance against added risks of operation on a five per cent grade. *Seattle v. Seattle, Renton & Southern R. Co.*..... 94
9. EMINENT DOMAIN—TITLE ACQUIRED—WHEN PASSES—STATUTES. The title to the property condemned does not pass until the payment into court of the damages awarded, under Rem. & Bal. Code, § 7784, providing that upon proof that damages awarded had been paid . . . into court . . . the court shall enter an order that the condemnner shall have the right to take possession of the property "and thereupon the title to any property so taken shall vest in fee simple in such city or town." *Port of Seattle v. Yesler Estate*.. 166
10. EMINENT DOMAIN—TITLE ACQUIRED—WHEN PASSES—STIPULATIONS—PAYMENT OF AWARD—RELATION. Where, in eminent domain proceedings, pursuant to a stipulation, an award of damages was made January 17, and judgment thereon was entered January 21, but the award of damages was not paid into court until February 20 (the lien for taxes thereby attaching on February 3d before the title passed), the payment of the award does not relate back to the 17th day of January, as between the parties, by reason of provisions in the stipulation authorizing the award of damages to the effect that out of the award shall be paid all liens, including taxes, which may be adjudged valid liens "as of this date," the amount of such liens to be retained out of the award until finally determined. *Port of Seattle v. Yesler Estate*..... 166
11. SAME—PASSING OF TITLE—AWARD IN COURT—IMPRESSED WITH TAX LIEN. Where the title to land condemned did not pass to the condemning municipality until after February 3d, when, as between grantor and grantee, the general taxes for the preceding year became a lien upon the land, so that the land itself could not be reached in the collection of the taxes, the award paid into court should be impressed with a lien for the taxes, attached to the land as against the condemnnee as owner. *Port of Seattle v. Yesler Estate* 166

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of judgment *non obstante*, see JUDGMENT, 1.

EQUITY:

See CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS.

Form of action, see ACTION, 1.

Equitable estoppel, see ESTOPPEL.

Abatement of nuisance under red light law, see NUISANCE.

Execution of trust, see TRUSTS.

1. EQUITY—LACHES—DELAY. Having in 1879, accepted a deed with a reservation in full satisfaction of a bond for a deed, it is now too late to assert any equitable claim by reason of the terms of the bond. *Studebaker v. Beek*..... 260

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of will, see WILLS, 4.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTIMATES:

Cost of local improvement, see MUNICIPAL CORPORATIONS, 11.

ESTOPPEL:

To question boundary line, see BOUNDARIES, 2.

To urge invalidity of stock subscription, see CORPORATIONS, 8.

By election of remedy, see ELECTION OF REMEDIES.

By judgment, see JUDGMENT, 5, 6.

Of lessors to deny title of purchasers, on sale of interest in crops by lessees, see LANDLORD AND TENANT, 1, 2.

By adverse possession, see LIMITATION OF ACTIONS, 3.

Of assignee of redemptioner to assert title under subsequent execution sale, see MORTGAGES, 3.

Of city upon adoption of "paper" grade of streets, see MUNICIPAL CORPORATIONS, 10.

Of vendor from refusing to carry out contract, see VENDOR AND PURCHASER, 5.

1. ESTOPPEL—BY DEED—BOND FOR DEED—PERFORMANCE—ACCEPTANCE. Having accepted a deed with a reservation, in performance of a bond for a deed without any reservation, and canceled the bond on the records, the grantees are not in a position to insist that the reservation was improperly inserted in the deed, there being no suit to reform the deed. *Studebaker v. Beek*..... 260

EVICITION:

Of tenant of demised premises, see LANDLORD AND TENANT, 5-8.

EVIDENCE:

- See **BROKERS; COMPROMISE AND SETTLEMENT; PERJURY, 3.**
- Exceptions to findings for purpose of review, see **APPEAL AND ERROR, 2, 5, 9.**
- Review on appeal, see **APPEAL AND ERROR, 2, 5, 9, 10, 15, 21, 30-32.**
- Incorporation in record on appeal, see **APPEAL AND ERROR, 7, 10, 13-15.**
- Harmless error in rulings on, see **APPEAL AND ERROR, 30-32.**
- On note, see **BILLS AND NOTES, 1.**
- Establishment of boundary, see **BOUNDARIES, 1.**
- Want of consideration for transfer of property, see **CANCELLATION OF INSTRUMENTS.**
- For personal injuries to passenger, see **CARRIERS, 2.**
- Review of on record below, see **CERTIORARI.**
- To show terms of contract, admissibility, see **CONTRACTS, 1.**
- To establish reasonable value of extra work, see **CONTRACTS, 2.**
- Of good faith in making stock dividend, see **CORPORATIONS, 3.**
- Comment on by judge, see **CRIMINAL LAW, 3, 6.**
- Demand for production of incriminating evidence, see **CRIMINAL LAW, 4.**
- To show loss of earning capacity, see **DAMAGES, 3.**
- In action for wrongful death, see **DEATH.**
- Of fraud, sufficiency, see **FRAUD.**
- To show gift, see **GIFTS, 2-5.**
- Community nature of property, see **HUSBAND AND WIFE.**
- Negligence of custodian of insane person, see **INSANE PERSONS, 5, 6.**
- On insurance policy, see **INSURANCE, 1, 5, 6.**
- Estoppel of lessors to claim interest in crops, after sale by lessees, see **LANDLORD AND TENANT, 1, 2.**
- Indorsement of credits on notes as tolling statute, see **LIMITATION OF ACTIONS, 6.**
- Revival of debt by part payments, see **LIMITATION OF ACTIONS, 7.**
- For injuries to servant in general, see **MASTER AND SERVANT, 1.**
- For personal injuries to pedestrian, see **MUNICIPAL CORPORATIONS, 17.**
- Existence of partnership relation, see **PARTNERSHIP.**
- Review on certiorari, on findings made by land commissioner, see **PUBLIC LANDS.**
- For personal injuries from collision with train, see **RAILROADS, 2.**
- Of mistake in instrument, see **REFORMATION OF INSTRUMENTS.**
- Executed or executory contract, sufficiency, see **SALES, 3.**
- For rescission of contract to sell land, see **VENDOR AND PURCHASER, 1, 2.**
- Value of property converted, see **TROVER AND CONVERSION, 5.**
- Negligence in maintenance and operation of irrigation ditch, see **WATERS AND WATER COURSES, 9.**
- Forgery of testatrix's signature, see **WILLS, 4.**
- Parol evidence in construction of will, see **WILLS, 5.**

EVIDENCE—CONTINUED.

Testimony of witnesses, see **WITNESSES**.

Production of documents by witness, see **WITNESSES**, 3.

1. **EVIDENCE—JUDICIAL NOTICE—PRACTICE IN DEPARTMENT.** The court will take judicial notice of the practice of the commissioner of public lands to subpoena witnesses and administer oaths. *Crouch v. Ross* 73
2. **EVIDENCE—JUDICIAL NOTICE—PHYSICAL SUFFERING.** Courts will judicially notice that a compound comminuted fracture of the lower limb and a fracture of the femur are painful injuries, occasioning long suffering, although treated with the best of surgical skill. *Cranford v. O'Shea*..... 508
3. **EVIDENCE—JUDICIAL NOTICE—RECORDS.** The courts will take judicial notice of their records touching prior proceedings in the same case. *Perrault v. Emporium Department Store Co.*..... 578
4. **EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.** The practice of admitting photographs and models is to be encouraged as an aid to the comprehension of physical facts. *Kelly v. Spokane*..... 55
5. **EVIDENCE—REBUTTAL—REPUTATION OF DECEASED PARTY—ADMISSIBILITY.** In an action upon fire insurance policies, where the defense was that the insured, in making his proofs of loss, swore falsely, and fraudulently and intentionally overstated values and losses with intent to defraud, and where the insured died before the trial, it is admissible, in rebuttal of defendants' charges, to show the deceased's reputation for honesty and integrity. *Rasmusson v. North Coast Fire Insurance Co.*..... 569
6. **EVIDENCE—PAROL EVIDENCE—CONSIDERATION OF MORTGAGE—COLLATERAL AGREEMENT.** It is competent to show by parol the true consideration for executing a note and mortgage; hence it is admissible to show an oral collateral agreement whereby the mortgagee agreed to pay a street assessment then due and certain insurance premiums, which, by the terms of the mortgage, the mortgagors had agreed to pay, and which the mortgagors orally agreed to repay when the first installment of interest became due. *Harbican v. Skinner*..... 596
7. **SAME—PAROL EVIDENCE TO VARY WRITING—INCONSISTENCY—MORTGAGES—CONSTRUCTION.** An oral agreement by a mortgagee, at the time of the execution of a note and mortgage, to pay a street assessment then due and certain insurance premiums, which the mortgagors orally agreed to repay when the first installment of interest became due, is not inconsistent with the terms of the note and mortgage, requiring the mortgagors to pay all assessments, taxes and insurance, on pain of having the whole sum declared due and payable; in view of a provision to the effect that, upon failure of the mortgagors to make any payments when due, the mortgagee may, at

EVIDENCE—CONTINUED.

his option, pay any such sums, which shall be secured by the mortgage and draw interest; since this clause authorized the mortgagee to exercise his option of paying these items. *Harbican v. Skinner* 596

EXAMINATION:

Of witnesses in general, see **WITNESSES**, 1, 4.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 2, 5, 9;
CRIMINAL LAW, 6.

In deeds, see **DEEDS**.

Taking exceptions at trial, see **TRIAL**, 1.

EXCESSIVE DAMAGES:

See **DAMAGES**, 4, 5.

For malpractice, see **PHYSICIANS AND SURGEONS**, 2.

EXECUTION:

Of note, see **BILLS AND NOTES**, 1.

Sales by judgment creditor after redemption from mortgage foreclosure, see **MORTGAGES**, 2, 3.

Of trust, see **TRUSTS**.

EXECUTORS AND ADMINISTRATORS:

Entry of decree of distribution as upon due process of law, see **CONSTITUTIONAL LAW**, 5.

1. **EXECUTORS AND ADMINISTRATORS—EXPENSES—PAYMENT OF DEBTS—EXEMPT PROPERTY—LIFE INSURANCE.** Rem. & Bal. Code, §§ 1464 to 1467, providing for the payment of the expenses of administration, and of the funeral and last sickness out of the property of the estate regardless of certain exemptions, has no application to the proceeds or avails of life insurance made payable to the deceased's estate, executors or administrators; in view of the later act, § 569, exempting the proceeds of life insurance policies from all liability for any debt. *German-American State Bank of Ritzville v. Godman*..... 231
2. **SAME—EXEMPT PROPERTY—SETTING ASIDE—WIDOW'S ALLOWANCE—LIFE INSURANCE.** Rem. & Bal. Code, § 1466 *et seq.*, providing for certain exemptions to be set aside for the benefit of the widow and children, has no application to the proceeds or avails of life insurance which, by Id., § 569, is exempted from all debts; hence it is not necessary to order life insurance set aside to the widow as exempt. *German-American State Bank of Ritzville v. Godman*..... 231
3. **EXECUTORS AND ADMINISTRATORS—NONINTERVENTION WILL—DISTRIBUTION OF ESTATE—JUDGMENT—CONCLUSIVENESS.** Under Const., art. 6, § 4, giving the superior courts general jurisdiction, including

EXECUTORS AND ADMINISTRATORS—CONTINUED.

all matters of probate, and Rem. & Bal. Code, § 1444, providing that estates under nonintervention wills "may be managed and settled without the intervention of the court" (subject to supervision by the court if the trust is not faithfully performed), without denying the right of the executor of such a will to go into court to have it construed, the superior court has jurisdiction to entertain an application by the executor for an order of distribution of the estate which was in effect a construction of the will and within its general jurisdiction, in view of a trustee's right to maintain an action for directions, and the power of the court to direct and control trusts. *Bayer v. Bayer*..... 430

4. **SAME—JURISDICTION OF COURTS.** An executor under a nonintervention will, under which it is not necessary to take out letters, is in fact a trustee and derives his powers from the will and not from the court. *Bayer v. Bayer*..... 430
5. **EXECUTORS AND ADMINISTRATORS — DISTRIBUTION — DECREE — CONCLUSIVENESS.** A decree of final distribution in probate, after due notice and hearing, is of the same force as a judgment in any court of equal solemnity, and cannot be attacked or annulled in any collateral proceeding, except for fraud. *Meeker v. Waddle*..... 628
6. **SAME—DISTRIBUTION—DECREE.** A decree of final distribution including the wife's separate estate as community property cannot be set aside for fraud in procuring it, where it merely appears that the decree was obtained by falsely representing that the property was all community property, and that the surviving husband made a statement that the probate was for the purpose of shutting out heirs; since a decree cannot be vacated on the mere ground that it was based upon perjured testimony. *Meeker v. Waddle*..... 628

EXECUTORY CONTRACTS:

See **SALES**, 1-4.

EXEMPTIONS:

Property exempt from debts of estate, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

Of land from assessment, by offset of benefits against damages, see **MUNICIPAL CORPORATIONS**, 13.

1. **EXEMPTIONS—PROPERTY SUBJECT—AVAILS OF LIFE INSURANCE.** Under Rem. & Bal. Code, § 569, providing that the proceeds or avails of all life . . . insurance shall be exempt from all liability for any debt, the avails of life insurance policies payable to the insured's executors, administrators, or assigns, or to his estate or legal representatives are exempt from all the debts of the deceased, and of the estate or beneficiary at the time the proceeds become available. *German-American State Bank of Ritzville v. Godman*..... 231

EXTRA WORK:

Compensation for, see **CONTRACTS**, 2, 3.

FACTORY ACT:

Guarding machinery under factory act, see **MASTER AND SERVANT**, 5.

FALSE SWEARING:

See **PERJURY**.

FEDERAL COURTS:

When decisions controlling in state courts, see **COURTS**.

FEDERAL LIABILITY ACT:

See **MASTER AND SERVANT**, 5, 6.

FILING:

Conditional sales contract, see **SALES**, 6.

FINDINGS:

Necessity of exceptions for purpose of review, see **APPEAL AND ERROR**, 2, 5, 9.

Review of on appeal, see **APPEAL AND ERROR**, 24, 25.

Remand on appeal for failure to make findings of fact, see **APPEAL AND ERROR**, 26.

Of council as to necessity for filling lowlands, see **MUNICIPAL CORPORATIONS**, 12.

Of land commissioner, review of, see **PUBLIC LANDS**.

By court in civil actions, see **TRIAL**, 2, 3.

Special findings by jury, see **TRIAL**, 3.

FIRE ESCAPES:

Liability of landlord for expense of construction, see **LANDLORD AND TENANT**, 3.

FIRE INSURANCE:

See **INSURANCE**.

FORECLOSURE:

Of mortgage, see **CHATTEL MORTGAGES**, 3; **MORTGAGES**, 2, 3.

Of lien, see **MECHANICS' LIENS**.

FOREIGN CORPORATIONS:

See **BUILDING AND LOAN ASSOCIATIONS**.

FORFEITURE:

Of insurance, see **INSURANCE**, 3.

FORGERY:

Of testatrix's signature, see **WILLS**, 4.

FORMER ADJUDICATION:

See JUDGMENT, 5, 6.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW, 1.

FORMS OF ACTION:

See ACTION, 1.

FRANCHISE:

Grant by municipality, see MUNICIPAL CORPORATIONS, 14, 15.

FRAUD:

Joinder of parties plaintiff, see ACTION, 2.

Ground for cancellation of deed, see CANCELLATION OF INSTRUMENTS.

By insured in representing value of stock of goods, see INSURANCE, 1.

In procuring release of claim for injuries, see RELEASE.

Several verdict in action for, see TRIAL, 3.

Sales of realty, see VENDOR AND PURCHASER, 1, 2.

1. **FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY.** In an action by a subcontractor against the principal contractor to recover the value of excess work on a road contract, fraud on the part of the latter is sufficiently shown, where it appears that the latter was an experienced road builder, knew the nature of the clearing and grubbing to be done, and the prices for which it could be profitably done; that he knew the necessary amount of grubbing would equal at least twenty acres, but represented to the subcontractor that he had personally examined the road and there was about nine or nine and one-half acres of grubbing; that the subcontractor was less capable and experienced, and without sufficient time to carefully examine the nature and extent of the work before entering into the contract, and relied upon the representations of the principal contractor; and that there were in fact twenty-five acres of grubbing in excess of the representations of the latter. *Zindorf v. Tillotson* 472

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—CONTRACTS IN CONSIDERATION OF MARRIAGE.** An understanding before marriage that, when either should die, the survivor should have no interest in the decedent's estate, is not merely an agreement in contemplation of marriage, but is a promise made "upon consideration of marriage," and void under Rem. & Bal. Code, § 5289, unless made in writing. *Koontz v. Koontz* 180

FUTURE PAIN:

Damages for future pain and suffering, see DAMAGES, 1, 2.

GARNISHMENT:

Collateral attack upon garnishee judgment, see JUDGMENT, 3.

1. **GARNISHMENT — DEFENSES — ASSIGNMENT OF DEBT — DEFAULT OF GARNISHEE—JUDGMENT—CONCLUSIVENESS—LACHES—QUIETING TITLE—ADVERSE CLAIMS.** One indebted under a judgment which had been assigned before entry, who, upon being garnisheed by a third party in a suit against the judgment creditor, allowed a judgment to go against him by default as garnishee, cannot, after the lapse of two years, bring an action to determine to whom he must pay the judgment, under Rem. & Bal. Code, § 199, providing for an action to determine adverse claims by bringing all parties before the court in case more than one is interested in or claims to be the owner of the subject-matter of the suit; since, if he had notice of the assignment of the original judgment, he was bound to appear and defend the garnishment; and if the garnishment judgment was obtained by fraud and without notice to him of the assignment or opportunity to defend, his only remedy was to proceed within one year to set aside the judgment of garnishment, under Id., §§ 464, 467; since, by his own neglect, he allowed two judgments to go against him. *Benjamin v. Ernst*..... 59

GIFTS:

Of liquor to Indian, see INDIANS.

1. **GIFTS—ESSENTIALS.** To constitute a gift of personal property, there must be an intent to presently give, a subject-matter capable of delivery, and the actual delivery at the time. *In re Slocum's Estate* 158
2. **GIFTS—EVIDENCE.** Evidence of title by gift must be clear, convincing, strong and satisfactory. *In re Slocum's Estate*..... 158
3. **GIFTS—DELIVERY—PRESUMPTION FROM POSSESSION—BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.** Community property consisting of stocks, bonds and notes passed to the wife as a gift, where they were assigned by the husband to the wife, and were in her possession for twenty days prior to his death, and were kept by her in a secret place to which she alone had access; under the rule requiring actual delivery, with intent to divest present control and dominion, and that possession by an assignee of such instruments presumes a delivery. *In re Slocum's Estate*..... 158
4. **SAME.** Similar stocks and notes, made payable to the husband or wife, under the understanding that payments were to be made to the husband during life and after his death to his wife, or to either presenting the certificate, but not assigned, do not, under such circumstances, pass to the wife as a gift; since in the absence of an assignment, there is no evidence of intent to make a present gift, and possession is not alone sufficient to establish title. *In re Slocum's Estate* 158

GIFTS—CONTINUED.

5. **SAME.** For similar reasons, a certificate made payable to the wife, being presumptively community property, does not, under such circumstances, pass as a gift to her, since the fact of possession alone does not establish, by clear and convincing evidence, the husband's intent to make a gift; and in the absence of any assignment, delivery cannot be presumed from possession. *In re Slocum's Estate* 158

GOOD FAITH:

- In making stock dividend, see **CORPORATIONS**, 2, 3.
- In abolition of office held under civil service, see **MUNICIPAL CORPORATIONS**, 4.

GUARDIAN AND WARD:

- Right of guardian with adverse interests to appeal for minors, see **APPEAL AND ERROR**, 1.

HARMLESS ERROR:

- In civil actions, see **APPEAL AND ERROR**, 26-38.

HOTELS:

- Liability of lessee for expense of constructing fire escapes, see **LANDLORD AND TENANT**, 3.

HUSBAND AND WIFE:

- See **DIVORCE**.
- Failure of wife to join in supersedeas bond, see **APPEAL AND ERROR**, 4.
- Rights of survivor, see **EXECUTORS AND ADMINISTRATORS**, 2.
- Gifts from husband to wife, see **GIFTS**, 3-5.
- Disposition of community property, see **WILLS**, 1.
- Provision for wife as tolling revocation of will, see **WILLS**, 3.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to sustain findings that certain real property was community property of the plaintiff and his deceased wife, as against his claim that it was his separate property, where it appears that the original contract for the land ran to him and his wife as grantees, and that payments were made thereon from funds of the wife prior to her death, although thereafter he made final payment and took a deed in his own name. *Battiany v. McNeley* 666
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—BURDEN OF PROOF.** Property acquired after marriage, by either husband or wife or both, is presumed to be community property, the burden resting upon persons asserting a separate character to establish that fact by clear, certain and convincing evidence. *In re Slocum's Estate* 158

IMPEACHMENT:

Of witness, see **WITNESSES**, 4, 5.

IMPROVEMENTS:

On premises demised, liability of landlord, see **LANDLORD AND TENANT**, 3.

Public improvements, see **MUNICIPAL CORPORATIONS**, 3, 6-13.

INDEMNITY:

See **PRINCIPAL AND SURETY**.

As affecting obligation of sheriff to hold property after dissolution of attachment, see **SHERIFFS AND CONSTABLES**.

Subrogation of creditor to indemnity given to surety by principal debtor, see **SUBROGATION**.

1. **INDEMNITY — CONTRACTS — AMOUNT DUE—CONDITIONS PRECEDENT—BONDS—CONSTRUCTION.** Under an indemnity bond given by building contractors to the owners, conditioned to defend and save the owners harmless from the claims of the D. company and further providing that the final twenty per cent payment under the contract should be retained as additional indemnity until the obligors obtained a receipt in full from the D. company or until its claims should be outlawed, such final twenty per cent is not due until the happening of one of the conditions precedent stipulated in the bond; until which, judgment cannot be entered on the contract in favor of the contractors, if the sum unpaid is less than the twenty per cent to be retained as indemnity. *Mondtoll & Stewart v. American Building Co.* 584

INDIANS:

Giving intoxicating liquor to Indian, excessive sentence, see **CRIMINAL LAW**, 8.

1. **INDIANS — MIXED BLOOD — INTOXICATING LIQUORS.** Rem. & Bal. Code, § 6288, prohibiting the sale or gift to an Indian of mixed blood having more than one-eighth Indian blood applies to all such Indians, regardless of the status of their father or themselves as citizens, the prohibition of such act coming within the police power of the state. *State v. Kenney*..... 441

INDICTMENT AND INFORMATION:

Violation of building and loan association act, see **BUILDING AND LOAN ASSOCIATIONS**, 3.

1. **INDICTMENT AND INFORMATION—SUFFICIENCY—INCLUDED OFFENSES—ASSAULT—DEGREES.** Under Rem. & Bal. Code, § 2415, providing that every person committing an assault without amounting to an assault in either the first or second degrees shall be guilty of assault in the third degree, an information charging assault with intent to

INDICTMENT AND INFORMATION—CONTINUED.

commit a felony, to wit, a rape, which is a charge of second degree assault, is sufficient to sustain a conviction for the lesser offense of third degree assault, without specifically defining the crime of assault in the third degree. *State v. Steele*..... 470

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Jurisdiction of state courts to interfere with internal affairs of foreign beneficial association, see BENEFICIAL ASSOCIATIONS.

INSANE PERSONS:

1. **INSANE PERSONS—DISCHARGE FROM HOSPITAL—TORTS OF INSANE PERSON—LIABILITY OF SUPERINTENDENT.** Under Rem. & Bal. Code, § 5967, providing that any patient may be discharged from the state hospital for the insane when, in the judgment of the superintendent, it may be expedient, the superintendent acts in an official capacity in a matter involving his discretion in discharging an inmate, temporarily out on parole; hence he is not liable for damages sustained by a third person by reason of turning the inmate at large, where he did not act maliciously or corruptly. *Emery v. Littlejohn*... 334
2. **SAME—DISCHARGE FROM HOSPITAL—LIABILITY OF SUPERINTENDENT—NEGLIGENCE.** The fact that the superintendent acted negligently in discharging an inmate conditionally, and did not immediately take steps to send a guard for his return, upon hearing that he was giving some trouble (his relatives agreeing to send him East next morning) does not affect the nonliability of the superintendent to answer in damages to one who was injured by an insane attack of the discharged inmate. *Emery v. Littlejohn*..... 334
3. **SAME—DISCHARGE—POWERS OF SUPERINTENDENT—STATUTORY PROVISIONS.** The fact that Rem. & Bal. Code, § 5962, provides for the discharge of inmates of the hospital upon application of relatives, etc., by an order of court, after notice to the superintendent and a hearing with provisions for the return of the inmate in case he is not properly cared for or is dangerous, does not negative the superintendent's power to exercise discretion other than in relation to an absolute discharge; since the above section has nothing to do with the superintendent's discharge on his own motion. *Emery v. Littlejohn* 334
4. **SAME—DISCHARGE—ABSOLUTE OR CONDITIONAL.** The power of the superintendent of the state insane hospital, given by Rem. & Bal. Code, § 5967, to discharge inmates includes the power to discharge them conditionally or upon parole. *Emery v. Littlejohn*..... 334
5. **SAME—CUSTODIAN—DUTIES AND LIABILITIES—TORTS OF INSANE PERSON—EVIDENCE—SUFFICIENCY.** The husband of a woman who had

INSANE PERSONS—CONTINUED.

obtained the discharge and custody of her insane son from the state insane hospital is not liable in damages to one who sustained injuries in an insane attack by the son, where he had nothing to do with securing the discharge, and it appears from the evidence that the son had been afflicted with a mild form of insanity, and had never been considered dangerous, and after two weeks in the asylum was released on parole as greatly improved, and upon learning that the son was giving trouble by annoying attentions and letters to a young lady, and upon complaint by police officers, in order to avoid the son's recommitment, he agreed with the officers to send him East to relatives the next morning, and provided him with money therefor, with which he followed the girl, and made an attack upon being prevented from seeing her; since, under all the circumstances, he could not, as a matter of law, be reasonably expected to anticipate the consequences which followed. *Emery v. Littlejohn*.... 334

6. **SAME—QUESTIONS FOR JURY.** In such a case, the liability of the mother is a question for the jury, where it further appears that, in order to get her son released from the hospital, she signed an agreement to assume all responsibility for his actions, knowing that he was not fully recovered, and agreed to care for him, and was told that he was writing letters to a young lady with such frequency as to cause her great anxiety; the question whether she performed her voluntary assumed duty with reasonable care, and should have anticipated that he might become dangerous, being questions of fact for the jury. *Emery v. Littlejohn*..... 334

INSOLVENCY:

Of corporation, see **CORPORATIONS**, 5-9.

INSPECTION:

Of corporate books by stockholders, see **CORPORATIONS**, 1, 4.

INSTRUCTIONS:

Failure to include in abstract of record, see **APPEAL AND ERROR**, 16.

Error invited by appellant, see **APPEAL AND ERROR**, 20.

Harmless error in giving or refusing, see **APPEAL AND ERROR**, 33-36.

Exceptions to refusal to give, time for, see **TRIAL**, 1.

In action for obstructing stream and damaging crops, see **WATERS AND WATER COURSES**, 1, 2.

In action for reasonable value of goods ordered and accepted, see **WORK AND LABOR**.

INSURANCE:

Exemption of life insurance from payment of debts, see **EXECUTORS AND ADMINISTRATORS**, 1, 2; **EXEMPTIONS**.

On goods by direction of vendee as affecting nature of contract, see **SALES**, 4.

INSURANCE—CONTINUED.

Stipulations in action on fire insurance policy, see STIPULATIONS, 1.
 Proceeds of life insurance, testamentary disposition, see WILLS, 2.

1. INSURANCE—FIRE INSURANCE—POLICY—FRAUD—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. In an action upon fire insurance policies, the verdict of the jury to the effect that the plaintiff had not knowingly made any false statements in representing the value of his stock of goods, cannot be disturbed merely because the jury, in answer to special interrogatories, fixed the amount of his loss at about \$2,000, the plaintiff claiming \$3,000 and the defendants claiming that the loss did not exceed \$1,200, where the estimates of experienced adjusters differed widely as to the probable loss and there was no suggestion of fraud or wrongful action in any other particular and no proof that plaintiff knowingly made any false statements. *Rasmussen v. North Coast Fire Insurance Co.*..... 569
2. INSURANCE—PLEADINGS—DENIALS AND DEFENSES. Such a denial is not a "special denial" which would limit the general denial to the issues raised by the former; but is an affirmative defense in complete avoidance of the contract. *David v. Fidelity-Phenix Fire Insurance Co.* 242
3. SAME—ACTIONS—ISSUES—INSTRUCTIONS. In an action upon a fire insurance policy, upon an issue as to false statements in the proofs of loss, it is proper to instruct that an innocent misrepresentation in the proofs of loss would not avoid the policy, but that a fraudulent misrepresentation would avoid it. *David v. Fidelity-Phenix Fire Insurance Co.*..... 242
4. SAME—ACTIONS—INSTRUCTIONS—REQUESTS. Upon an issue as to false statements in the proofs of loss in an action on a fire insurance policy, an instruction that the jury must find that plaintiff knowingly and wilfully swore that the articles were in the house and destroyed by fire, when he knew they were not, with intent to defraud, is more comprehensive than a request to instruct the jury that the value set opposite the articles was immaterial, and justifies the refusal of such request. *David v. Fidelity-Phenix Fire Insurance Co.* 242
5. SAME—ACTION ON POLICY—STATUTORY PROVISIONS—VALUE OF PROPERTY LOST—EVIDENCE—ADMISSIBILITY. In an action upon fire insurance policies on a stock of groceries, agents who wrote and issued the policies may be called by the plaintiff to testify to the value of the stock at the time the policies were written and at the time of the fire, under 3 Rem. & Bal. Code, § 6059-105, providing that every agent who issues a fire insurance policy shall be presumed to know the value of the property insured, and shall be punishable by fine in case he knowingly issues policies in excess of the value of the property; the evident purpose of the statute being to prevent over-insurance. *Rasmussen v. North Coast Fire Insurance Co.*... 569

INSURANCE—CONTINUED.

6. **SAME—ACTIONS—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY.** In an action upon a fire insurance policy, the jury is not compelled to take the plaintiff's estimate of the value of the property claimed to have been destroyed by the fire, where the case rested largely upon opinion evidence, the items in the proofs of loss showed the character of the articles, the date of purchase, the cost price, and the plaintiff's estimated present value; as the weight of the evidence was for the jury. *David v. Fidelity-Phenix Fire Insurance Co.*..... 242
7. **SAME—ACTIONS—AMOUNT OF RECOVERY—VERDICT—JUDGMENT.** In an action upon a fire insurance policy, a verdict for the plaintiff for less than the amount of the policy does not entitle the plaintiff to judgment for the full amount of the policy, where the value of the property was in issue under the general denial, and defendant claimed that a large part of the insured property had been removed and was not destroyed by the fire. *David v. Fidelity-Phenix Fire Insurance Co.* 242

INTENT:

To make gift, see GIFTS, 1, 3-5.

Of debtor to have credits indorsed on notes, as tolling statute, see LIMITATION OF ACTIONS, 6, 7.

INTERSTATE COMMERCE:

Burdens upon, see COMMERCE.

INTOXICATING LIQUORS:

Sentence for giving liquor to Indian, excessiveness, see CRIMINAL LAW, 8.

Sale or gift of to Indians, see INDIANS.

1. **INTOXICATING LIQUORS — LOCAL OPTION — SHIPMENTS — WHOLE-SALER'S STOCKS AND DELIVERIES IN DRY UNITS.** It is not a violation of the local option law, Rem. & Bal. Code, § 6309, for a common carrier to ship intoxicating liquors in original packages to a wholesaler within a dry unit, to replenish his stock or to make deliveries on orders taken in a wet unit; since the prohibition of shipments into a dry unit excepts shipments or deliveries of unbroken packages at residences by manufacturers or wholesalers or by any common carrier, and only requires "retailers" to dispose of their stocks, and provides that the act shall not be construed to prohibit the manufacture of intoxicating liquors in any no-license unit, "nor the delivery of the same;" thereby allowing wholesalers to make sales in wet units, and replenish their stocks and make deliveries in dry units. *State v. Northern Pac. R. Co.*..... 188

ISSUANCE:

Of bridge bonds by city, see MUNICIPAL CORPORATIONS, 21-23.

JEOPARDY:

Former jeopardy, see **CRIMINAL LAW**, 1.

JOINDER:

Of parties plaintiff in action for fraud, see **ACTION**, 2.

Of parties in supersedeas bond, see **APPEAL AND ERROR**, 4.

JUDGES:

Certificate to proceedings or statement of facts, see **APPEAL AND ERROR**, 6, 10, 11.

Comment on evidence, see **CRIMINAL LAW**, 3, 6.

Change of venue for bias of, see **JUDGMENT**, 2; **VENUE**.

JUDGMENT:

See **GARNISHMENT**.

Review, see **APPEAL AND ERROR**.

Entered upon due process of law, see **CONSTITUTIONAL LAW**, 5.

Against stockholders of insolvent corporation, finality, see **CORPORATIONS**, 5.

Decisions of courts in general, see **COURTS**.

In divorce, see **DIVORCE**, 3, 4.

Condemnation proceedings, see **EMINENT DOMAIN**, 6.

Decree of distribution of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3, 5, 6.

In action on fire insurance policy, see **INSURANCE**, 7.

For enforcement of mechanics' lien, see **MECHANICS' LIENS**.

Foreclosure, see **MORTGAGES**, 2, 3.

1. **JUDGMENT—NON OBSTANTE VEREDICTO.** Where the court can say, as a matter of law, that there is neither fact nor reasonable inference from facts to support a verdict for plaintiff, it is warranted in entering judgment notwithstanding the verdict, and is not restricted to the granting of a new trial, if on the facts the plaintiff could not state a cause of action. *Johnston v. Nichols*..... 394
2. **JUDGMENT—VACATION—"PROCEEDINGS"—TRIAL—CHANGE OF VENUE—BIAS OF JUDGE.** Under Rem. & Bal. Code, §§ 467, 468, providing that proceedings to vacate or modify a judgment for fraud in obtaining it shall be by verified petition, with process, pleadings and issues made up in the same way as in an original action, an application to modify a judgment is a new and independent proceeding within the purview of 3 Rem. & Bal. Code, §§ 209-1, 209-2, providing for a change of judges for bias in any action or "proceeding." *Cooper v. Cooper*..... 85
3. **JUDGMENT—BY DEFAULT—CONCLUSIVENESS—COLLATERAL ATTACK.** Where a garnishee had suffered a default, and claimed he had no notice of the defense that his debt had been assigned, his action to bring all parties before the court to determine to whom he should

JUDGMENT—CONTINUED.

pay the judgment, under Rem. & Bal. Code, § 199, is a collateral attack upon the garnishee judgment, which can only be held void for reasons affirmatively appearing upon the record. *Benjamin v. Ernst* 59

4. JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK. A judgment or decree of a court of competent jurisdiction cannot be set aside by a court of coordinate jurisdiction, the power to vacate judgments being entirely different from the power to reverse them; and the relief must be sought in the court where the judgment was entered. *Bayer v. Bayer*..... 430
5. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—IDENTITY OF ISSUES. A judgment of dismissal in an action to recover on an express contract for the construction of a local improvement, is not *res judicata*, so as to bar a second action to recover the reasonable value of labor performed and material furnished which the city had taken advantage of in the completion of the improvement, where the only issues tendered in the former action were that the contract had not been performed according to its terms, and that the city had a right to take the work over at any time it might decide that it was not being done properly and finish it at the cost of the contractor and his bondsmen, and where the court made no findings as to the amount due on the contract, and did not pass upon the amount due for labor and materials furnished, but dismissed the action on the plea of abandonment (in the nature of a plea in bar) on the ground that the contractor had been guilty of a fraud and had abandoned the contract. *Mallory v. Olympia*..... 499
6. SAME—IDENTITY OF ISSUES—EVIDENCE TO SUSTAIN. In such a case, under the test as to whether the same evidence would have maintained both actions, the first judgment would not be a bar to the second action, unless, to meet the plaintiff's *prima facie* case on the contract and performance, the city should prove that the work had not been completed to its satisfaction and it had completed the work at a cost and damage to the city that would offset the contract price, in which action the value of the goods and labor was immaterial; while in the second action the contract and performance was immaterial, and use by the city of materials and labor furnished and their reasonable value made a *prima facie* case for the plaintiff. *Mallory v. Olympia* 499

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1-3.

JUDICIAL POWER:

See CONSTITUTIONAL LAW, 1.

JURISDICTION:

- Of state courts to enjoin threatened cancellation of certificate by foreign beneficial association, see **BENEFICIAL ASSOCIATIONS**.
- Alimony and suit money pending appeal, see **DIVORCE**, 3.
- Modification of decree, see **DIVORCE**, 4.
- Decedents' estates, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.
- To vacate judgment, see **JUDGMENT**, 4.
- Of courts to inquire as to regularity in passage of ordinance, see **MUNICIPAL CORPORATIONS**, 2.
- Levy of assessment for filling lowlands, see **MUNICIPAL CORPORATIONS**, 12.
- Of public service commission in regulation of water companies, see **WATERS AND WATER COURSES**, 3-5.

JURY:

- Challenges to jurors in prosecution for "capital offense," see **CRIMINAL LAW**, 2.
- Verdict in criminal prosecutions, see **CRIMINAL LAW**, 5.
- Right to jury trial, in action to abate nuisance under red light law, see **NUISANCE**, 2.
- Verdict in civil actions, see **TRIAL**, 3.

1. **JURY—COMPETENCY—PRIOR SERVICE AS JUROR.** The fact that jurors had served at the same term of court in a criminal case of the same nature was not a disqualification, where all who were allowed to sit had asserted they would disregard the testimony given in the prior case and render a verdict upon the facts as disclosed in the case on trial. *State v. Austin*..... 444

JUSTIFICATION:

- For abandonment, see **DIVORCE**, 1.

KNOWLEDGE:

- As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 3, 7.
- Of owner of building as to existence of nuisance, see **NUISANCE**.

LACHES:

- Effect in equity, see **EQUITY**.
- In bringing action to determine adverse claims, see **GARNISHMENT**.

LANDLORD AND TENANT:

- Rights of lessee of stockholder in mutual water company, see **WATERS AND WATER COURSES**, 6-8.

1. **LANDLORD AND TENANT—CROPPING LEASE—CONDITIONS—UNAUTHORIZED TRANSFER—RATIFICATION—ESTOPPEL—EVIDENCE—SUFFICIENCY.** Lessors who had made a cropping lease for winter wheat providing

LANDLORD AND TENANT—CONTINUED.

that the title to the crop should remain in them until receipt of their share, and that the lessees should not assign the lease without their consent or dispose of any part of the crop to the lessors' prejudice, will be held to have ratified a public sale of their interests, made by the lessees in February, and are estopped to dispute the title of the purchasers at the sale, where there was evidence to the effect that the purchasers worked on the crop in March, April and May in full view of the lessors, living near by and working on adjoining land and that the lessors, shortly after the sale when the prospects for a crop were poor, were notified of the sale and made no objection or claim until May 20th, after the prospects for a large crop were assured. *Marwell v. Dimond*..... 30

2. SAME—OWNERSHIP OF CROP—ESTOPPEL—EVIDENCE—ADMISSIBILITY. In an action for the conversion of wheat, purchased by plaintiffs from a cropping tenant, regardless of restrictive clauses in the lease, evidence of plaintiffs' continued cultivation of the crop is admissible on the question of their good faith, and also on an issue of the estoppel of the defendant lessors after knowledge of such cultivation. *Marwell v. Dimond*..... 30
3. LANDLORD AND TENANT—REPAIRS—LIABILITY OF LANDLORD—FIRE ESCAPES—POLICE REGULATIONS. Rem. & Bal. Code, § 6030 *et seq.*, relating to hotels, inns, and public lodging houses, regulating the construction of fire escapes therefor, and providing (§ 6046) that "any owner, manager, agent or person in charge of a hotel" who shall violate the provisions of the act shall be guilty of a misdemeanor, has reference to the owner of a hotel business (under lease without restrictions upon the use or covenants to repair) and not the owner of the building (out of possession); and hence, where fire escapes are required upon a hotel building under the exercise of the police power, the duty and expense of construction devolves upon such a lessee where there is no covenant in the lease imposing such duty on the landlord. *Clarke v. Yukon Investment Co.*... 485
4. LANDLORD AND TENANT—DEFECTIVE PREMISES—LIABILITY OF LANDLORD AND TENANT—CAVEAT EMPTOR. In the absence of warranty or covenant to repair, the landlord is under no legal duty to find and disclose obscure defects in the leased premises of which he has no knowledge, but the doctrine of *caveat emptor* applies in such cases; hence the landlord is not liable for personal injuries to a tenant resulting from the giving away of a porch railing the structural weakness of which was as patent to the tenant as to the landlord. *Johnston v. Nichols*..... 394
5. LANDLORD AND TENANT—EVICTION—ACTION—DEMAND. In a tenant's action for eviction and wrongful conversion of property, demand for restoration is not essential, where the landlord had served notice of forfeiture rescinding the lease, taken possession, and the

LANDLORD AND TENANT—CONTINUED.

- evidence showed that the demand would have been futile, and there was sufficient evidence to go to the jury on the question of eviction and conversion. *King v. King*..... 615
6. **SAME—EVICTION—DEFENSES—EVIDENCE—QUESTION FOR JURY.** In an action for wrongful eviction, upon an issue as to whether the plaintiffs or their agent had set fire to and injured the buildings, the question is for the jury, where there was evidence that the fire was of incendiary origin, deliberately arranged by someone who lived in or had access to the house, and to the locked rooms containing plaintiffs' effects, and that plaintiffs and one R. were the only persons having such access. *King v. King*..... 615
7. **LANDLORD AND TENANT—EVICTION—ISSUES AND DEFENSES—INSTRUCTIONS.** In an action for wrongful eviction, upon an affirmative defense and counterclaim that plaintiffs or their agent had set fire to the building to defendants' damage, it is error to give an instruction confining the evidence touching the fire to the sole office of proving the counterclaim, and inferentially eliminating the defense, where there was evidence clearly relevant tending to prove the affirmative defense, even if insufficient to establish the counterclaim. *King v. King*..... 615
8. **SAME—EVICTION—MEASURE OF DAMAGES.** In the absence of proof of special damages, the measure of damages for a wrongful eviction is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved therefor. *King v. King*..... 615

LANDS:

See PUBLIC LANDS.

LARCENY:

Verdict of guilty, on acquittal of codefendant, see CRIMINAL LAW, 5.

LAW OF THE CASE:

See APPEAL AND ERROR, 39-42.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

Delegation of, see CONSTITUTIONAL LAW, 1.

LIENS:

See MECHANICS' LIENS.

Of agister, see ANIMALS.

Tax lien, see TAXATION.

LIMITATION OF ACTIONS:

Laches, see EQUITY.

1. **LIMITATION OF ACTIONS—WHAT LAW GOVERNS—LAW OF FORUM.** Where a creditor elects to sue in this state, where the debtor had resided ever since the inception of the debt, the statute of limitations of the forum governs. *Arthur & Co. v. Burke*..... 690
2. **LIMITATION OF ACTIONS—ACCRUAL—CHANGE OF STREET GRADES—VIOLATION OF ORDINANCE.** Limitations against an action to restrain a city from the violation of an unrepealed ordinance officially establishing curb grades, by the threatened lowering of the grade without first paying compensation, begin to run with each actual physical change, and not from the date of an ordinance authorizing an improvement under which certain previous physical changes had been made contrary to the originally established grades. *Ludwigs v. Walla Walla* 205
3. **LIMITATION OF ACTIONS—AGAINST COUNTY—TAX TITLE HELD BY COUNTY—ADVERSE POSSESSION—ESTOPPEL.** Property purchased by a county at a general tax foreclosure sale for want of other purchasers, and held in trust for the state, county, and other political subdivisions entitled to an apportionment of the tax on a resale, is taken and held by the county in its governmental capacity, as distinguished from its proprietary capacity, in the exercise of the sovereign power of taxation; hence the statute of limitations does not run in favor of one in the adverse possession of the land while the title was held by the county; nor would there be any element of estoppel, where the adverse claimant had not made improvements or paid any taxes. *Gustavson v. Dwyer*..... 303
4. **SAME—DEFENSE.** The statute of limitations is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts. *Arthur & Co. v. Burke*..... 690
5. **LIMITATION OF ACTIONS—TOLLING STATUTE—PARTIAL PAYMENTS—BURDEN OF PROOF.** Credits of partial payments do not toll the statute of limitations unless a voluntary payment was authorized or ratified by the debtor; mere indorsement is not competent proof of the date of payment, and the burden of proof rests upon the party asserting it. *Arthur & Co. v. Burke*..... 690
6. **SAME—TOLLING STATUTE—CREDIT ON NOTES—INTENTION OF DEBTOR—EVIDENCE—SUFFICIENCY.** Indorsements of partial payments upon notes are not sufficient to toll the statute of limitations where it appears that the debtor, then owing \$600 on account, without regard to consigned goods, reconsigned the goods held on consignment for sale on commission with directions to credit his account with the proceeds when the goods were sold, and two years later, at the request of the creditor, executed notes for the \$600 representing the balance due on account, upon which credits were later indorsed for

LIMITATION OF ACTIONS—CONTINUED.

antecedent sales of the reconsigned goods, the date of which sales were not shown but which must have been more than six years prior to the commencement of the action; since all intention of the debtor to have credits indorsed on the notes was negatived by the facts that the notes were not made until two years after the arrangement for such credits, and that no reference thereto was made at the time the notes were given. *Arthur & Co. v. Burke*..... 690

7. **SAME—PART PAYMENTS—REVIVAL OF DEBT—EVIDENCE—SUFFICIENCY.** A barred debt is not revived by part payment unless the circumstances show a clear and unequivocal intention on the part of the obligor to revive the whole debt; and assent to a revival of notes is not shown by the sale of goods and credit of the proceeds, without notice to the debtor, ten years after the notes were given. *Arthur & Co. v. Burke*..... 690

LOCAL OPTION:

See **INTOXICATING LIQUORS.**

LOGS AND LOGGING:

Condemnation by logging railroad, see **EMINENT DOMAIN**, 1-3.

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1, 5.

Recovery of reasonable value of machinery ordered and accepted, see **WORK AND LABOR.**

MALPRACTICE:

See **PHYSICIANS AND SURGEONS.**

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 26.

MARRIAGE:

Promise "upon consideration of marriage," see **FRAUDS, STATUTE OF.**
As revoking will, see **WILLS**, 3.

MASTER AND SERVANT:

Liens for labor and materials, see **MECHANICS' LIENS.**

Employees of municipal corporations, see **MUNICIPAL CORPORATIONS**, 4, 17.

1. **MASTER AND SERVANT—INJURIES TO SERVANTS—INEXPERIENCED EMPLOYEE—WARNING—DEFECTIVE APPLIANCES—EVIDENCE—SUFFICIENCY.** The master is liable to an inexperienced elevator boy, injured by being caught through a peculiar action of the elevator in starting or stopping it, where it appears that he had no previous experience, and

MASTER AND SERVANT—CONTINUED.

had used the elevator only two or three times before the accident, that he was only instructed that a certain pull on the cable would start it and an opposite pull would stop it; but there was evidence tending to show that its operation was peculiar, because it would start with a jerk, and frequently required several pulls in order to stop it, or would start of its own accord after being apparently stopped, of which facts he was not warned. *Mueller v. Dennis*.. 123

2. MASTER AND SERVANT—SAFE PLACE TO WORK—NEGLIGENCE—HAZARDOUS EMPLOYMENT—OBVIOUS DANGERS. It is not negligence on the part of a master in failing to supply a safe place to work, rendering him liable for the death of an employee, in that he required the latter to work in a rowboat upon a stream impounded by a dam with spillways rendering the current swift, which was in places unsafe for a rowboat, where it was safe in the places where the men were required to work, if they used ordinary care, and where the danger was as open and apparent to the employee as to the master. *Le Claire v. Washington Water Power Co.*..... 560
3. SAME—DUTY OF MASTER—SAFE APPLIANCES—KNOWLEDGE OF SERVANT. In an action for the death of an employee resulting from loss of control of a rowboat occasioned by the slipping of an oarlock, the fact that the boat furnished by the employer was fragile and light, being a Mullin's steel boat, would not render the master liable, where it appears that it was a boat in common use, with no structural defects, that the employee was as cognizant of its strength or frailty as the employer, and that the slipping of the oarlock from its socket was the result not of the insufficient strength of the boat to stand the strain but of the manipulation of the oar. *Le Claire v. Washington Water Power Co.*..... 560
4. SAME—USUAL APPLIANCES. The failure to fasten the oarlocks in their sockets so as to prevent their coming out by reason of faulty manipulation of the oars cannot be charged as negligence on the part of the employer, where it was usual and customary to leave the oarlocks unfastened. *Le Claire v. Washington Water Power Co.* 560
5. MASTER AND SERVANT—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—APPLICABILITY OF STATE STATUTE. The Federal employers' liability act, § 3, providing that contributory negligence is not a defense in any case where the common carrier's violation of "any statute" enacted for the safety of employees contributed to the injury, has reference only to Federal statutes; hence, in an action under that act, the failure of the employer to safeguard dangerous machinery under the state factory act, Rem. & Bal. Code, §§ 6587-6598, cannot be taken into consideration as excusing the employee's contributory negligence or his assumption of risks (overruling *Op-*

MASTER AND SERVANT—CONTINUED.

- sahl v. Northern Pac. R. Co.*, 78 Wash. 197). *Lauer v. Northern Pac. R. Co.* 465
6. **MASTER AND SERVANT—ACTIONS—VARIANCE—RECOVERY AT COMMON LAW.** In an action for personal injuries under the Federal employers' liability act, in which plaintiff shows that the injury occurred in interstate commerce, he has no right to have the case submitted to the jury as a common law action, upon failure to prove a case under the Federal act. *Lauer v. Northern Pac. R. Co.* 465
7. **SAME—HAZARDOUS EMPLOYMENT—ASSUMPTION OF RISK—SKILL OF EMPLOYEE—REPRESENTATIONS TO MASTER.** Where an employee of mature years undertakes to perform a service in a hazardous employment, representing that he had had experience, the dangers of which are open and apparent, he impliedly represents that he has sufficient skill to perform the service, and the employer is not liable to him for an injury resulting merely because he overestimated his qualifications. *Le Claire v. Washington Water Power Co.* 560
8. **SAME—ASSUMED RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** Whether an employee in railroad construction work assumed the risks or was guilty of contributory negligence in obeying an order to ride upon the front of the engine, whereby he was thrown onto the rails when a heavy pinch bar on the foot board joggled off and struck dirt dumps that had not been leveled, are questions for the jury, where, although the employee knew of the presence of the pinch bar and the roughness of the roadbed, he did not know of the presence of the dirt dumps, which were usually leveled off as soon as dumped, and he was ordered to hurry, so that he had no opportunity to select a safer place on the front of the engine than the one he occupied. *Rastelli v. Henry* 225
9. **MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.** Whether the foreman of railroad construction work was guilty of negligence in not anticipating injury to an employee whom he ordered to ride on the front of the engine, is a question for the jury, where there was evidence that the foreman placed a heavy pinch bar on the foot board of the engine, which joggled off on account of the roughness of the roadbed, and struck dirt dumps which the foreman knew had not been leveled, and caused the employee to be thrown onto the tracks. *Rastelli v. Henry* 225

MATURITY:

Of mortgage debt, option to declare due, see **MORTGAGES**, 1.

MEASURE OF DAMAGES:

See **DAMAGES**.

For condemnation of property, see **EMINENT DOMAIN**, 8.

For wrongful eviction, see **LANDLORD AND TENANT**, 8.

MECHANICS' LIENS:

1. **MECHANICS' LIENS — FORECLOSURE — CONDITIONS PRECEDENT — AMOUNT DUE.** In an action to foreclose a mechanics' lien, the plaintiff is not entitled to judgment until the debt is due. *Mondiot & Stewart v. American Building Co.*..... 584

MENTAL SUFFERING:

As element of damages, see **DAMAGES**, 1, 2.

MISREPRESENTATION:

See **FRAUD**.

By mortgagor to creditors, see **CHATTEL MORTGAGES**, 2.

By insured, see **INSURANCE**, 1, 3, 4.

By vendor in sale of land, see **VENDOR AND PURCHASER**, 1, 2.

MISTAKE:

Possession under mistake as to boundary line, see **ADVERSE POSSESSION**.

Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.

MODELS:

As evidence, see **EVIDENCE**, 4.

MODIFICATION:

Of contract, see **CONTRACTS**, 3.

Of decree in divorce, see **DIVORCE**, 4.

Of judgment, see **JUDGMENT**, 2.

MONOPOLIES:

Grants of privileges or immunities, see **CONSTITUTIONAL LAW**, 3.

MORALITY:

Evidence of to impeach witness, see **WITNESSES**, 5.

MORTGAGES:

Personal property, see **CHATTEL MORTGAGES**.

Parol evidence to vary or explain, see **EVIDENCE**, 6, 7.

Reformation of, see **REFORMATION OF INSTRUMENTS**.

1. **MORTGAGES—CONSTRUCTION—DEFAULTS — MATURITY OF DEBT — OPTION TO DECLARE.** An oral agreement by the mortgagee on the execution of a mortgage to pay street assessments and insurance then due, the same to be repaid by the mortgagors when the first installment is due, will be held an exercise of his option, provided in the mortgage, to pay any such sums upon failure of the mortgagors to do so, and have them secured by the mortgage, with interest; hence

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he cannot declare the whole sum due for defaults of the mortgagors, until after such repayments become due under the oral agreement. *Harbican v. Skinner*..... 596

2. **MORTGAGES—FORECLOSURE—SALE—REDEMPTION—SUBSEQUENT JUDGMENT SALES—RIGHTS OF PURCHASER—TITLE.** Where a judgment creditor, having redeemed from a mortgage foreclosure sale cutting off his judgments, caused the property to be sold under execution on his judgments to D., and also afterwards assigned to D. his certificates of redemption from the mortgage foreclosure sale, such execution sales passed no more than a right to redeem from the mortgage foreclosure sale, time for which redemption was not extended by the executions upon the judgments; and D. was accordingly entitled to demand the sheriff's certificate of sale on foreclosure, after expiration of the period of redemption, although in the meantime he had sold his interests by virtue of the judgments and execution sales thereunder to a third party, with notice of all the proceedings. *Wechner v. Dorchester*..... 118
3. **SAME—RIGHT OF ASSIGNEES OF JUDGMENT—ESTOPPEL.** In such a case, there being no fraud alleged and all the parties having full notice of all the proceedings and the state of the title, the assignment and sale of whatever rights the judgments or the sales thereunder carried, without any intention to release the rights secured by redemption from the mortgage foreclosure sale, does not estop the assignee of the redemptioner from the mortgage foreclosure sale to assert that his assignment and sale of all interests under the judgments did not convey the title to the land; since estoppel does not operate where all parties had equal knowledge, and no misrepresentations or attempts to deceive were made. *Wechner v. Dorchester*..... 118

MOTIONS:

Change of venue in civil actions, see **VENUE**.

MUNICIPAL CORPORATIONS:

Delegation of police power to cities, see **CONSTITUTIONAL LAW**, 2.

Condemnation of property, see **EMINENT DOMAIN**, 5-11.

Accrual of action to restrain change of grade, see **LIMITATION OF ACTIONS**, 2.

Changing railroad grade crossings, see **RAILROADS**, 1.

Filing claims against city for damages, see **STATUTES**.

Water supply, service to consumers, see **WATERS AND WATER COURSES**, 3-5.

1. **MUNICIPAL CORPORATIONS—ORDINANCES—REQUISITES—PASSAGE—VALIDITY.** The charter requirement of a city that an ordinance shall not be passed at the meeting at which it is introduced cannot be evaded by the subterfuge of first introducing what purported to be

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an ordinance, but which was without body or parts, and could only have been intended as the title to an ordinance subsequently to be written, and at the next meeting of the council introducing a completed ordinance with substantially the same title but containing various other matters not embraced within the title first introduced. *Tennent v. Seattle*..... 108

2. SAME—ORDINANCE—PASSAGE — VALIDITY — DETERMINATION BY COURTS. The courts are not deprived of their right to inquire into the manner in which city ordinances are introduced and passed, upon the principle that the enrolled bill is in itself conclusive evidence of regularity in its passage, as in the case of legislative acts; since the city is not one of the three coordinate branches of the government, but is only exercising delegated authority in a prescribed manner, and an authority must be exercised to see that the city performs its functions in such manner. *Tennent v. Seattle*..... 108
3. SAME—ORDINANCES — INDEFINITENESS. An ordinance authorizing a local improvement and assessment therefor cannot be held void for indefiniteness, where it follows the lines of the statutory requirements conferring such power upon municipalities and contains all the material provisions therein set forth. *Vincent v. South Bend* 314
4. MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL—CIVIL SERVICE—ABOLITION OF OFFICE—GOOD FAITH. An officer in the civil service of a city cannot be removed from office by an ordinance abolishing the office for the sole purpose of getting rid of the man, and immediately recreating the office and appointing another to the position; and repeated attempts to do this, after being enjoined from removing the officer, and while the duties of the office still exist and are performed by others, shows the bad faith of the city. *State ex rel. Gilmur v. Seattle*..... 91
5. SAME—CONTRACTS—AUTHORITY — INVALID ORDINANCE. A contract deriving its sanction wholly from an ordinance of a city is invalid, where the charter prescribed that no ordinance should be passed at the same meeting at which it was introduced, and this provision was violated by the council. *Tennent v. Seattle*..... 108
6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—NOTICE—CONSTITUTIONAL LAW—DUE PROCESS. Under Rem. & Bal. Code, §§ 7772 and 7792, making eminent domain proceedings to condemn property for a local improvement and the proceedings to assess the benefits therefrom two entirely separate proceedings so far as acquiring jurisdiction and the questions involved are concerned, owners in the district assessed for benefits, but whose lands are not taken, are not deprived of property without due process of law in that they were not served with notice of the condemnation proceedings or given an opportunity to be heard therein; notwithstanding that

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- the jury in such a proceeding is authorized to find the damages to the defendants for land taken and to the balance of their lands not taken after offsetting the benefits, thereby precluding the assessment of such lands not taken. *In re Pine Street Assessment*..... 281
7. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ABANDONMENT — ACCEPTANCE OF BENEFITS—QUANTUM MERUIT. As cities should be held to the same standard of morals imposed by law on individuals, an action on *quantum meruit* for the value of labor and materials, furnished by a contractor for a local improvement and utilized by the city in completing the work, may be maintained against the city; and the city, in accepting the benefits of the contractor's labor and materials, is not in a position to urge fraud of the contractor in attempting to bribe the city engineer as a defense to the action. *Mallory v. Olympia*..... 499
8. MUNICIPAL CORPORATIONS — STREET GRADES — CHANGE — DAMAGES. Both the city and property owners are bound to observe and conform to a definite street and curb grade, once established, and the city may not change it by order or motion without payment of any damages resulting to abutting owners; and such owners cannot recover damages for the destruction of sidewalks which did not conform to the official grade. *Ludwigs v. Walla Walla*..... 205
9. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CHANGE OF STREET GRADE—LIABILITY—PAPER GRADE. Where a "paper" grade had not been acted upon and no physical grade had been made, a city is not liable for damages to unimproved abutting property by reason of a change of the grade. *Spokane v. Ladies' Benevolent Society* 382
10. SAME—RELIANCE ON "PAPER" GRADE—IMPROVEMENTS — ESTOPPEL. Where a city has adopted a "paper" grade of one of its streets and, pending a physical grade thereof, an abutting lot owner has improved his property with reference to such "paper" grade, he may recover damages as for a change of grade, his right being referable to the doctrine of estoppel. *Spokane v. Ladies' Benevolent Society* 382
11. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—PRELIMINARY ESTIMATE—INCREASE—VALIDITY. The estimate of the cost of a local improvement, required by Rem. & Bal. Code, § 7974, to be approved by the council on the initiation of the proceedings, is for the sole purpose of determining whether the council will initiate the improvement, and the assessment is not invalidated by the fact that it greatly exceeds the estimate, where it did not exceed the actual *bona fide* or ultimate cost of the improvement, and can readily be accounted for by changed conditions; in view of Rem. & Bal. Code, § 7983, providing that, when the estimated cost is found too high or too low, the city shall, after due notice and hearing, make rebates or add the required additional amount to the assessment roll, appor-

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- tioning the amount to the several pieces of property benefited as if it had been an original estimate. *Vincent v. South Bend*..... 314
12. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — JURISDICTION — FINDING OF NECESSITY — CONCLUSIVENESS. An assessment for the purpose of filling lowlands in cities of the second and third classes, under Rem. & Bal. Code, § 7971 *et seq.*, authorizing it whenever the city council shall deem it necessary or expedient on account of the public health, sanitation, etc., cannot be attacked as beyond the jurisdiction of the council from the fact that it was not necessary for the public health or sanitation, where the record shows that the council did determine this question of its jurisdiction by finding the necessary facts to exist; since the question of necessity is, in the first instance, a legislative question, and conclusive on collateral attack; Rem. & Bal. Code, § 7905, prohibiting the setting aside of such assessments except on the ground of fraud. *Richardson v. Olympia*..... 638
13. SAME — IMPROVEMENTS — ASSESSMENT OF BENEFITS — EXEMPTIONS — PROCEEDINGS. An award of damages in eminent domain proceedings to take land for street purposes, after fixing the amount for the land taken, reciting "For damages to remaining land by reason of severance, \$150," must, in the light of instructions directing the jury to offset the benefits against such damages, be construed as a net damage over and above special benefits, exempting the land from assessment, as authorized by Rem. & Bal. Code, § 7782. *In re Pine Street Assessment* 281
14. MUNICIPAL CORPORATIONS — FRANCHISES — ULTRA VIRES — RAILWAY BRIDGES OVER STREETS. Under the delegation of police powers to cities conferred by art. 11, § 11, of the state constitution, and under Rem. & Bal. Code, §§ 7507, 7510, conferring power upon cities of the first class to authorize and regulate the construction and operation of railroads within the corporate limits, to construct and keep in repair bridges, viaducts and tunnels, to authorize the location, construction and operation of railroads "in, along, over and across any highway" or street, the action of the city in granting a franchise ordinance to a railway to construct bridges over certain streets is not *ultra vires* as being in excess of corporate powers; since not only the power to compel the separation of street grades at railroad crossings is a legitimate exercise of the police power, but authority is expressly conferred by the employment of the word "over" in conjunction with "in, along and across," in the statute authorizing the grant of such ordinances. *Detamore v. Hindley*..... 322
15. SAME — USE OF STREETS — RAILROAD BRIDGES. There is shown a reasonable necessity for supports for overhead railway bridges requiring spans across the street more than forty feet in length, although it was possible to construct bridges without such supports,

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where the franchise required bridges without supports only in case the span would be less than forty feet, and where it appears the location was sparsely settled, the widest piers were three feet and one-half in thickness, and left passageways for vehicles from twenty-two to sixteen feet in width on each side of the central pier, and sidewalk space on both sides of the street eleven and one-half feet in width over the graded streets. *Detamore v. Hindley*..... 322

16. **SAME—STREETS—REGULATION AND CONTROL—REVIEW BY COURTS.** Since the power to require grade separations for streets and railways exists as an integral part of the police power of the city, the appropriate means to its exercise rests largely in the discretion of the city's governing body, and, in the absence of a clear abuse, will not be interfered with. *Detamore v. Hindley*..... 322

17. **MUNICIPAL CORPORATIONS—STREETS—INJURIES TO PEDESTRIAN—NEGLIGENCE OF CITY EMPLOYEES—EVIDENCE—SUFFICIENCY.** Granting that a pedestrian was guilty of contributory negligence in crossing a wire, city employees reeling up the wire and knowing of his presence were bound to use a degree of care commensurate with the added danger; and whether they did so is a question for the jury, where it appears that the wire was held taut by a peavy stuck in the planking, that plaintiff started to cross the wire to board a street car, and was warned not to do so, and after waiting a short time, again started to cross, that the employee holding the peavy knew of his presence, and after he had allowed him to cross, the peavy gave way and plaintiff was caught in the snap of the wire. *Gladen v. Seattle*..... 412

18. **MUNICIPAL CORPORATIONS—STREETS—CONSTRUCTION WORK—INJURY TO PEDESTRIAN—NEGLIGENCE—KNOWLEDGE OF CITY—ASSUMPTION OF RISKS.** A city is not liable for injuries sustained by a pedestrian in stepping across a cable necessarily used by the city in street construction work, of which plaintiff had notice, and who was tripped by the tightening of the cable on starting up the donkey engine, unless the city or some city agent had notice, or in the exercise of ordinary care, must have had notice that the plaintiff was about to step over the cable at the time the donkey engine was started; notwithstanding that the street was not closed to traffic, as the cable was itself notice of danger of which pedestrians assumed the risk when attempting to cross without any notice to the city. *Zellers v. Bellingham* 601

19. **SAME—INJURY TO PEDESTRIANS—NEGLIGENCE—QUESTION FOR JURY.** In such a case, the negligence of the city is a question for the jury, where plaintiff testified that the cable was lying loose upon the highway, and was suddenly raised as she was in the act of stepping over it, while the evidence of the defendant was to the effect that the cable was taut, and after watching the work while the cable was in

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this position, plaintiff attempted to step over it and caught the heel of her shoe on the cable and fell, and the city employees did not see her until she had fallen. *Zellers v. Bellingham*..... 601

20. MUNICIPAL CORPORATIONS—STREETS—INJURIES—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE. A person approaching a railroad crossing intent on that danger and the danger from the sweep of a crossing guard, is not, as a matter of law, guilty of contributory negligence in stepping into a hole at the edge of the sidewalk, about 10 or 12 inches square, as she had a right to assume that the city had performed its duty as to any part of the walk. *Kelly v. Spokane* 55
21. SAME—BRIDGE BONDS—CONDITIONS PRECEDENT—ACQUISITION OF LANDS. The obtaining of property on which to place a city bridge is not a condition precedent to the issuance of bonds to procure funds for the construction of the bridge, and the validity of the bonds is not affected thereby, where it is not shown that there is any impediment preventing the city from ultimately obtaining the property. *Tennent v. Seattle*..... 108
22. SAME—CONTROL OVER STREETS—STATUTORY PROVISIONS. An agreement with, or consent of, the Port of Seattle is not essential to an issue of bridge bonds by the city of Seattle for various bridges, on the theory that the Port of Seattle has some interest therein, under a provision of the city charter providing that when the electors shall have adopted a comprehensive plan or scheme of harbor or port improvement, the control of streets therein shall be vested in the Port of Seattle within thirty days after it is prepared to proceed therewith; since the provision is not self-executing, and the Port's interest will not accrue until the comprehensive plan has been adopted. *Tennent v. Seattle*..... 108
23. SAME—BONDS—SUBMISSION TO VOTE—INVALID ORDINANCE—RATIFICATION. Where a city charter makes an ordinance an essential to the institution of proceedings to submit a bond issue to a vote of the people, and the ordinance submitting the matter is invalid, the bonds are not rendered valid by the fact that the incurrence of the indebtedness was approved by the electors of the city at the election subsequently held under such ordinance. *Tennent v. Seattle*.... 108
24. MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—STATUTORY PROVISIONS. Rem. & Bal. Code, § 7995, providing that claims for damages against a city shall be filed with the city clerk within thirty days, and in cases of cities of the first class, shall comply with its charter provisions, which required the claim to be filed within thirty days and "be sworn to by the claimant" which provisions are made mandatory, is not unreasonable, as applied to a case where the injured person was delirious and so incapacitated as to be unable to make and swear to a claim within the thirty days; and it is not sufficient that, within the thirty days, the claimants filed a claim

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sufficient in all respects except that it was sworn to by the father and not by the claimant. *Haynes v. Seattle*..... 51

25. **MUNICIPAL CORPORATIONS—CLAIMS—PERSONAL INJURIES—DESCRIPTION—SUFFICIENCY.** A notice of claim against a city for injuries to the back part of both legs, and to the left heel and tendon Achilles, further alleging that plaintiff was crushed and bruised to such an extent that she could not walk, was sufficient to admit proof of broken bones in the foot and ankle resulting in "flat foot" or broken arch. *Lowery v. Spokane*..... 300

MUTUAL BENEFIT SOCIETIES:

See **BENEFICIAL ASSOCIATIONS.**

NECESSITY:

Of exceptions for purpose of review, see **APPEAL AND ERROR**, 2, 5, 9.
For statement of facts for purpose of review, see **APPEAL AND ERROR**, 8, 10.

Of abstract of record, see **APPEAL AND ERROR**, 12, 13.

For taking land for right of way, see **EMINENT DOMAIN**, 3.

For filling lowlands, conclusiveness of findings of council, see **MUNICIPAL CORPORATIONS**, 12.

For piers for overhead railway bridge across street, see **MUNICIPAL CORPORATIONS**, 15.

For findings of fact, see **TRIAL**, 2.

NEGLIGENCE:

Of carrier, see **CARRIERS**.

Measure of damages, see **DAMAGES**.

Causing death, see **DEATH**.

In discharge of insane person, see **INSANE PERSONS**, 2.

Of custodian of insane person released from hospital, see **INSANE PERSONS**, 5, 6.

Demised premises, see **LANDLORD AND TENANT**, 4.

Of servant, see **MASTER AND SERVANT**, 5, 8.

Cause of personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 17-20.

In treating patient, see **PHYSICIANS AND SURGEONS**.

Of person injured by operation of railroad, see **RAILROADS**, 2.

Irrigation canal, see **WATERS AND WATER COURSES**, 6-9.

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEW TRIAL:

Affidavits on motion for as part of record on appeal, see **APPEAL AND ERROR**, 7.

Review of discretion in granting new trial, see **APPEAL AND ERROR**, 23.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 3.

Of proceedings to condemn property for improvement, see **MUNICIPAL CORPORATIONS**, 6.

Claim for damages, see **MUNICIPAL CORPORATIONS**, 24, 25.

Of action, see **PROCESS**.

NUISANCE:

1. **NUISANCE—DISORDERLY HOUSE—ABATEMENT—KNOWLEDGE OF OWNER OF BUILDING.** In an action to abate a nuisance under the red light law, brought against the property and the lessees and owners of the building, it is immaterial that the owners had no knowledge that prostitution was being carried on at the place, if, in fact, it existed. *State ex rel. Dow v. Nichols*..... 676
2. **SAME—ABATEMENT—CIVIL ACTION—RIGHT TO JURY TRIAL.** Under 3 Rem. & Bal. Code, § 946-1, of the red light law, in which the building or place in which assignation or prostitution is conducted or carried on and the furniture and contents are declared a nuisance, a jury trial cannot be demanded in a civil action brought in equity in the name of the state to abate the same, as authorized by *Id.*, § 946-2. *State ex rel. Dow v. Nichols*..... 676

OBJECTIONS:

Waiver of objections to pleading, see **APPEAL AND ERROR**, 27; **PLEADING**.

OBSTRUCTIONS:

Of water course, see **WATERS AND WATER COURSES**, 1, 2.

OFFICERS:

Right to search for and retain effects on arrest of accused, see **ARREST**.

Delegation of judicial and legislative powers to state officer, see **CONSTITUTIONAL LAW**, 1.

Discharge of insane person from hospital, see **INSANE PERSONS**.

Municipal officers, removal of, see **MUNICIPAL CORPORATIONS**, 4.

Return of property on dissolution of attachment, see **SHERIFFS AND CONSTABLES**.

OPTION:

To declare mortgage debt due, see **MORTGAGES**, 1.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

ORDERS:

- Review of, see **APPEAL AND ERROR**, 19, 23.
- Of public service commission in regulating water company, see **WATERS AND WATER COURSES**, 3-5.

ORDINANCES:

- Accrual of action to restrain violation of, by change of street grade, see **LIMITATION OF ACTIONS**, 2.
- Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1-5, 23.

PAROL CONTRACTS:

- See **FRAUDS**, **STATUTE OF**.

PAROL EVIDENCE:

- In civil actions, see **EVIDENCE**, 6, 7.
- To construe will, see **WILLS**, 5.

PARTIES:

- Joinder of parties plaintiff in action for fraud, see **ACTION**, 2.
- Persons entitled to claim by prescription, see **ADVERSE POSSESSION**.
- Entitled to agister's lien, see **ANIMALS**.
- Entitled to appeal, see **APPEAL AND ERROR**, 1.
- Joinder in supersedeas bond, see **APPEAL AND ERROR**, 4.
- Accommodation makers, see **BILLS AND NOTES**, 2, 4.
- Rights and liabilities as to costs, see **COSTS**.
- Condemnation proceedings, see **EMINENT DOMAIN**, 5.
- Collateral attack on judgment, see **JUDGMENT**, 3.
- Entitled to sue, see **TROVER AND CONVERSION**, 3, 4.

PARTNERSHIP:

1. **PARTNERSHIP—EXISTENCE—PROOF—EVIDENCE—SUFFICIENCY.** As the existence of a partnership depends upon the intent of the parties, and may be established by circumstantial evidence, tending to show a joint or common venture combining property, labor or skill, or some of these elements for the purpose of joint profit, the evidence is sufficient to establish, between an aunt and niece, a partnership relation in the lodging house business, where it appears that the business was started entirely with the money of the niece, then a young girl, who devoted her whole time to the business for fifteen years, and through whose efforts the business gained large profits, and assumed large proportions including several establishments, and the aunt had declared many times in the presence of numerous witnesses that she and her niece were equal partners in all the business conducted; and when, in view of all the circumstances, little weight should be given to the fact that the business was conducted and titles taken in the name of the aunt. *Nicholson v. Kidbury* 196

PART PAYMENT:

Within statute of limitations, see **LIMITATION OF ACTIONS**, 5-7

PASSAGE:

Of city ordinance, see **MUNICIPAL CORPORATIONS**, 1, 2, 5.

PASSENGERS:

Carriage of, see **CARRIERS**.

PAYMENT:

See **COMPROMISE AND SETTLEMENT**.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 4, 9-11.

Of expenses of administration, see **EXECUTORS AND ADMINISTRATORS**, 1.
To contractors, under indemnity bond, see **INDEMNITY**.

Part payment within statute of limitations, see **LIMITATION OF ACTIONS**, 5-7.

PERFORMANCE:

Of agreement to sell stock and make distribution to stockholders, see **BANKS AND BANKING**.

Of contract, implied warranty, see **SALES**, 5.

PERJURY:

1. **PERJURY — ELEMENTS OF OFFENSE — DEGREES — STATUTORY DEFINITIONS.** "Perjury in the second degree" as defined by Rem. & Bal. Code, § 2353, covering oral or written false swearing concerning any matter whatsoever whether as a volunteer or in a proceeding or investigation authorized by law, is not included within, and conviction thereof cannot be had under, a charge of perjury under Id., § 2351, defining perjury in the "first degree" as knowingly testifying falsely concerning material matters in any action, proceeding . . . or investigation in which an oath may be lawfully administered (covering the crime of willful and corrupt perjury at common law as an "obstruction of justice"), in which there can be no shades or degrees of the offense. *State v. Wilson*..... 419
2. **SAME—DEFENSES — MATERIALITY OF FALSE TESTIMONY.** Rem. & Bal. Code, § 2352, providing that it shall be no defense for "perjury in the first degree" (common law perjury, as to material matters under Id., § 2351) that the defendant did not know the materiality of his false statement if it was indeed material and might have affected such proceeding, does not contemplate that, if the testimony be material to the issue, the offense would be perjury in the first degree, and, if not material, "perjury in the second degree" (false swearing concerning any matter whatsoever, under Id., § 2353). *State v. Wilson*..... 419

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3. **SAME—EVIDENCE—ADMISSIBILITY.** In a prosecution for perjury, where the state has introduced evidence tending to show that defendant had made defamatory statements in a spirit of malice towards the prosecuting witness, defendant is entitled to introduce evidence denying or explaining away the alleged statements. *State v. Wilson* 419
4. **SAME—INSTRUCTIONS.** Where the court, in a prosecution for perjury, has instructed the jury that every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false, qualifying it by further instructing that, in order to find the defendant guilty, they must find that he willfully gave the testimony knowing the same to be false and untrue, that intent is the basis of every moral action, and that the words "knowingly and willfully" mean with a criminal intent, it was not error to refuse a requested instruction covering honest belief, reasonable ground for believing his testimony to be true, evident forgetfulness, and lack of intent to willfully testify falsely. *State v. Wilson*..... 419

PERSONAL INJURIES:

- To passengers, see **CARRIERS**.
- Damages for, see **DAMAGES**, 1-4.
- Torts of insane person, see **INSANE PERSONS**.
- To tenant from defective premises, see **LANDLORD AND TENANT**, 4.
- To employee, see **MASTER AND SERVANT**.
- To person on city street, see **MUNICIPAL CORPORATIONS**, 17-20, 24, 25.
- Notice of claim for, see **MUNICIPAL CORPORATIONS**, 24, 25.
- To person on or near railroad tracks, see **RAILROADS**, 2.
- Release of claim for, see **RELEASE**.

PHOTOGRAPHS:

- As evidence, see **EVIDENCE**, 4.

PHYSICAL SUFFERING:

- Judicial notice of, see **EVIDENCE**, 2.

PHYSICIANS AND SURGEONS:

1. **PHYSICIANS AND SURGEONS—MALPRACTICE—LIABILITY.** A physician called to treat a person is liable only for the suffering caused by his own negligent acts, and not for that caused by the original injury. *Cranford v. O'Shea*..... 508
2. **PHYSICIANS AND SURGEONS—MALPRACTICE—EXCESSIVE DAMAGES.** A verdict for \$7,385 for malpractice is excessive and should be reduced to \$5,385, where, in treating a fracture of the lower limb, the surgeon omitted to treat a fracture of the femur, which knit in

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such a way as to require breaking and cutting the two ends by another surgeon in order to accomplish a good recovery. *Oranford v. O'Shea* 508

PLEADING:

Harmless error in pleading, see **APPEAL AND ERROR**, 27.

Harmless error in rulings on, see **APPEAL AND ERROR**, 28.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

On insurance policy, see **INSURANCE**, 2.

In action for personal injuries under Federal employers' liability act, see **MASTER AND SERVANT**, 6.

Effect of stipulations on issues, see **STIPULATIONS**.

1. **PLEADING—COMPLAINT—DEMURRER—WAIVER.** Under Rem. & Bal. Code, § 263, providing that the objection that the complaint does not state a cause of action may be taken any time, either in the superior or supreme court, pleading over after a demurrer is sustained does not waive the objection. *Benjamin v. Ernst*..... 59

POLICE POWER:

See **CONSTITUTIONAL LAW**, 2.

Construction of fire escapes on hotels, liability of lessee for expense of, see **LANDLORD AND TENANT**, 3.

Regulation and use of streets, see **MUNICIPAL CORPORATIONS**, 14-16.

Exercise of by city in changing grade crossings, see **RAILROADS**, 1.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

Character of to establish title, see **ADVERSE POSSESSION**.

Of property by donee, see **GIFTS**, 3-5.

Of property by vendor as determining nature of contract, see **SALES**, 2.

Of property converted, see **TROVER AND CONVERSION**, 1, 4.

POWERS:

Of superintendent to discharge insane persons from hospital, see **INSANE PERSONS**, 3, 4.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**; **COSTS**; **CRIMINAL LAW**; **EVIDENCE**; **JUDGMENT**; **VENUE**.

Prosecution of actions in general, see **ACTION**.

Procedure of particular courts, see **COURTS**.

PREFERENCES:

Of creditors by vendees in conditional sales contract, see **SALES**, 6.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 26-38.

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Liability of landlord for defects, see **LANDLORD AND TENANT**, 4.

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Of claim for damages, see **MUNICIPAL CORPORATIONS**, 24, 25.

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On appeal, see **APPEAL AND ERROR**, 22.

From possession of property, see **GIFTS**, 3-5.

As to community nature of property, see **HUSBAND AND WIFE**, 2.

As to executory nature of contract, see **SALES**, 2.

As to delivery of contract, see **VENDOR AND PURCHASER**, 4.

PRINCIPAL AND AGENT:

See **BROKERS**.

Agent of building and loan association, see **BUILDING AND LOAN ASSOCIATIONS**, 2, 3.

PRINCIPAL AND SURETY:

See **INDEMNITY**.

Subrogation of creditor to rights of surety, see **SUBROGATION**.

1. **PRINCIPAL AND SURETY—REMEDIES OF CREDITORS—RECOURSE OF INDEMNITY TO SURETY—SUBROGATION.** When a contractor gave a bond to secure the faithful performance of a building contract, obligating both principal and surety to pay in any event, and was required by the surety to execute to it a trust deed of certain realty to secure it against "any loss or damage" it might suffer on account of such bond, the obligee in the bond is entitled to be subrogated to the rights of the surety in the trust deed, although it may have been collateral to his own agreement with the building contractor and without his knowledge, and although the surety, by reason of its insolvency, may never be subjected to "any loss or damage" as distinguished from a "liability" on account of its undertaking. *Johnson v. Martin* 364

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Of contract creditors, see **CHATTEL MORTGAGES**, 1.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 3.

1. **PROCESS—RETURN—CONCLUSIVENESS—SUBSTITUTED SERVICE—CONTRADICTION—SUFFICIENCY.** Since a sheriff's return of process may

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be rebutted as to facts not within his special knowledge, his return of a substituted service, under Rem. & Bal. Code, § 226, to the effect that he served the defendant by leaving a copy with his wife at the house of "the usual abode" of the defendant at S. in this state, is overcome, and the service should be quashed, where it appears by the uncontradicted affidavit of the defendant that he was an elector of Idaho residing at H. in said state and had no residence or usual abode in this state, and that his wife when served was in temporary lodgings at S. where she had gone temporarily for medical treatment. *Wilbert v. Day*..... 390

PROFITS:

Anticipated profits, evidence of, see DAMAGES, 3.

PROHIBITION:

Shipments of liquor into dry unit, see INTOXICATING LIQUORS.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of loss insured against, see INSURANCE, 3, 4.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.

Damages for injuries to, see DAMAGES, 5.

Taking or damaging for public use, see EMINENT DOMAIN.

Exempt from payment of debts, see EXECUTORS AND ADMINISTRATORS.
1, 2; EXEMPTIONS.

Separate or community nature of, see HUSBAND AND WIFE.

Surrender of on dissolution of attachment, see SHERIFFS AND CONSTABLES.

Taxation of, see TAXATION.

Conversion of personal property, see TROVER AND CONVERSION.

Subject to testamentary disposition, see WILLS, 1, 2.

PROSTITUTION:

Abatement of disorderly house under red light law, see NUISANCE.

PROXIMATE CAUSE:

Of injury to passenger on street car, see CARRIERS.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 3, 6-13.

PUBLIC LANDS:

1. PUBLIC LANDS—FINDINGS OF COMMISSIONER—REVIEW—CERTIORARI—EVIDENCE. Where the commissioner of public lands took evidence,

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and made findings thereon, certiorari brings such evidence up for review, even if the commissioner might have determined the matter on his own investigation without the taking of evidence. *Crouch v. Ross* 78

PUBLIC SERVICE COMMISSION:

Regulation of water rates and service, see **WATERS AND WATER COURSES**, 8-5.

PUBLIC USE:

Taking property for public use, see **EMINENT DOMAIN**.

PUNISHMENT:

See **CRIMINAL LAW**, 8.

QUANTUM MERUIT:

See **MUNICIPAL CORPORATIONS**, 7; **WORK AND LABOR**.

QUESTION FOR JURY:

See **COMPROMISE AND SETTLEMENT**.

Negligence of custodian of insane person released from hospital, see **INSANE PERSONS**, 5, 6.

In action for wrongful eviction of tenant, see **LANDLORD AND TENANT**, 6.

In action for injury to servant, see **MASTER AND SERVANT**, 8, 9.

In action for injuries to person in city street, see **MUNICIPAL CORPORATIONS**, 17, 19.

Fraud in procuring release of claim for injuries, see **RELEASE**.

QUIETING TITLE:

Right of judgment debtor as garnishee, after assignment of debt, to bring action to determine adverse claims, see **GARNISHMENT**.

RAILROADS:

Appropriation of property, see **EMINENT DOMAIN**, 1-3.

As employers, see **MASTER AND SERVANT**, 5, 6.

Construction of bridges over city streets, see **MUNICIPAL CORPORATIONS**, 14, 15.

1. **RAILROADS—CHANGING GRADE CROSSINGS—POLICE POWER.** It is a legitimate exercise by a city of the police power to require a separation of grades where a public service railroad crosses a city street, and is in accord with general laws (Rem. & Bal. Code, §§ 7507, 7510). *Detamore v. Hindley*..... 322
2. **RAILROADS—INJURIES AT CROSSINGS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The plaintiff was guilty of contributory negligence, as a matter of law, in run-

RAILROADS—CONTINUED.

ning his automobile into a train on a spur track crossing a city street, in the nighttime, where it appears that the automobile was traveling fifteen miles per hour and could have been stopped within fifteen or twenty-five feet, that its headlights enabled the plaintiff to see an object within a radius of one hundred feet, which was the width of the street, that the train, with signal lights in view, was moving at about four miles an hour and was stopped before the collision within four feet, after having moved into the street sixty or seventy feet, and the box car first coming into the street was struck with great force by the automobile within eight feet of the front end of the car; since it is clear that the train came within the zone covered by the headlights and could or should have been seen by the plaintiff in time to have avoided the accident, when in fact, plaintiff did not see the train until the moment of the impact. *Allison v. Chicago, Milwaukee & St. Paul R. Co.*..... 591

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Of acts of lessees in selling lessors' interest in crops, see **LANDLORD AND TENANT**, 1.
Of city indebtedness, see **MUNICIPAL CORPORATIONS**, 23.

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See **BROKERS**.

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Evidence in civil action, see **EVIDENCE**, 5.

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See **CHATTEL MORTGAGES**, 1.
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REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—DEGREE OF PROOF.** Reformation of an instrument for mutual mistake will not be granted unless the evidence is clear and convincing that the writing was not what the parties intended and that the mistake was mutual. *Moore v. Parker* 399
2. **SAME—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY.** The evidence does not establish mutual mistake warranting reformation of a

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mortgage and notes, which authorized a deficiency judgment against the mortgagors, where it appears that the mortgagors were persons of more than ordinary intelligence and education, one of them being a lawyer of experience, that they executed the mortgage and notes upon the customary printed forms, after consultation with a lawyer who claimed that the stenographer failed to include therein an agreement that no personal liability should rest upon the members, and that the notes and mortgage were signed without reading, and defendants' evidence as to such an agreement was denied and the denial corroborated and the agreement was not established by a preponderance of the evidence. *Moore v. Parker*..... 399

REGISTRATION:

Of chattel mortgages, see **CHATTEL MORTGAGES**, 1.

REGULATION:

Validity of act regulating building and loan associations, see **CONSTITUTIONAL LAW**, 1, 3, 4.

Of city streets, see **MUNICIPAL CORPORATIONS**, 14-16.

Of water company by public service commission, see **WATERS AND WATER COURSES**, 3-5.

REHEARING:

On appeal or writ of error, see **APPEAL AND ERROR**, 43.

RELEASE:

See **COMPROMISE AND SETTLEMENT**.

1. **RELEASE—FRAUD—BURDEN OF PROOF—INSTRUCTIONS.** Where one of the defenses in a personal injury case was a release and discharge, alleged by plaintiff to be procured by fraud, a general instruction that the burden of proving the affirmative defenses was upon the defendant, is not misleading or error, where, as to this particular defense, the jury was instructed that the burden was upon the plaintiff to overcome the defendant's *prima facie* case by evidence that was "clear, strong, satisfactory, and convincing." *Pierce v. Seattle Electric Co.*..... 141
2. **SAME—FRAUD—MATTERS OF OPINION—QUESTION FOR JURY.** Notwithstanding that statements of physicians to the effect that plaintiff would probably recover in a few weeks were matters of opinion, a finding that a release was induced by fraud is a question for the jury, where there was other evidence to the effect that plaintiff was further induced by statements that the release was only a receipt for the money paid, to be applied on account in event her injuries were permanent. *Pierce v. Seattle Electric Co.*..... 141

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 26.

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Change of venue or place of trial, see **VENUE**.

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REPUTATION:

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RESCISSION:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2.

RESERVATION:

In deeds, see **DEEDS**.

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See **JUDGMENT**, 5, 6.

Conclusiveness of determination as to validity of claims against insolvent bank, see **CORPORATIONS**, 5.

RETURN:

Of process in general, see **PROCESS**.

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See **TAXATION**.

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See **APPEAL AND ERROR**; **CERTIORARI**.

In criminal prosecution, see **CRIMINAL LAW**, 6, 7.

Of findings of commissioner of public lands, see **PUBLIC LANDS**.

REVIVAL:

Of debt by part payments, see **LIMITATION OF ACTIONS**, 7.

REVOCAION:

Of will by marriage, see **WILLS**, 3.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 5, 7, 8.

ROADS:

Streets in cities, see **MUNICIPAL CORPORATIONS**, 8-10, 13-20, 22.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 2.

SALES:

Agreement for sale of stock and distribution to stockholders, see
BANKS AND BANKING.

Election of remedy by vendor, see ELECTION OF REMEDIES.

Of liquor to Indian, see INDIANS.

By lessees of lessors' interest in crops, ratification, see LANDLORD
AND TENANT, 1.

On foreclosure of mortgage, see MORTGAGES, 2, 3.

Wrongful sale of property, see TROVER AND CONVERSION.

Of realty, see VENDOR AND PURCHASER.

Recovery of reasonable value of machinery ordered and accepted,
see WORK AND LABOR.

1. **SALES—EXECUTORY OR EXECUTED—INTENT—"SOLD."** Whether a sale is executed or executory will depend on the intent of the parties, and the use of the word "sold" is not conclusive when other conditions in the contract indicate a different intention. *North Idaho Grain Co. v. Callison*..... 212
2. **SAME—EXECUTED SALE—EXISTENCE OF PROPERTY—POSSESSION OF VENDOR—PRESUMPTIONS.** There can be no valid executed sale unless the thing sold has an actual or potential existence at the time of the sale; and if the property is to be acquired by the vendor, it is *prima facie* an executory contract. *North Idaho Grain Co. v. Callison*. 212
3. **SAME—EXECUTED OR EXECUTORY CONTRACT—EVIDENCE—SUFFICIENCY.** An accepted offer of two hundred tons of number one timothy hay is not an executed contract for the sale of the hay, on which an action for the contract price will lie, but only an executory contract for breach of which the vendee is liable only for damages for loss of profits, where the vendor did not have the hay at the time of the sale, and in buying hay to fill the order did not set aside and appropriate a specific lot of hay and hold it subject to the contract; but after getting together part of the hay, reappropriated and converted it to the vendor's own use, expecting to substitute hay from the next year's crop. *North Idaho Grain Co. v. Callison*..... 212
4. **SAME—EFFECT OF INSURANCE—EVIDENCE—SUFFICIENCY.** In such a case, the nature of the contract is not affected by the fact that the vendee directed insurance to be carried, where the direction was made at a time when the vendee believed the hay had been purchased and specifically assigned to its account, whereas it was part of a common mass, and the insurance was not in the vendee's name, but a blanket policy covered all of the vendor's hay. *North Idaho Grain Co. v. Callison*..... 212
5. **SALES—IMPLIED WARRANTY—SUITABILITY FOR SPECIFIC PURPOSE—CONTRACT—PERFORMANCE.** Under a contract for the construction of

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a new hoist for a gasoline logging engine, in accordance with a blue print and specifications, there is no implied warranty that the same, when constructed according to the contract and specifications, will be suitable for the specific purpose for which it was intended, or that the engine specified in the contract, when connected up with the hoist as a completed rig, would furnish sufficient power to do the work. *Mianus Motor Works v. Vollans*..... 680

6. **SALES—CONDITIONAL SALES—FAILURE TO FILE—STATUS OF CREDITORS—PREFERENCE.** The failure to file in the auditor's office a conditional sales contract within ten days, whereby the sale became absolute as to subsequent creditors in good faith, under Rem. & Bal. Code, § 3670, does not prevent the vendees from returning the mill to the vendor as a preferred creditor, in payment of the balance of the purchase price, as against subsequent creditors who had no lien upon the mill or claims reduced to judgment, the value of the mill at the time of the preference not being disproportionate to the debt due. *Secor v. Olose*..... 77

SEARCHES AND SEIZURES:

Search for and retention of effects on arrest of accused, see **ARREST**.

SELECTION:

Of jury, number of challenges, see **CRIMINAL LAW**, 2.

Of route by logging railroad, see **EMINENT DOMAIN**, 3.

SENTENCE:

In criminal prosecutions, see **CRIMINAL LAW**, 8.

SERVICE:

Of process, see **PROCESS**.

SETTLEMENT:

See **COMPROMISE AND SETTLEMENT**.

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 3.

Of claim for personal injuries, see **RELEASE**.

SHERIFFS AND CONSTABLES:

1. **SHERIFFS AND CONSTABLES—ATTACHMENT—DISSOLUTION—SURRENDER OF PROPERTY—SUBSEQUENT APPEAL—EFFECT.** Upon dissolution of an attachment, the sheriff is bound to return the property to the defendant, upon demand, immediately without waiting for an appeal to be taken and perfected, and is not liable to the plaintiff if, upon appeal subsequently taken, with supersedeas, the order dissolving the attachment is reversed. *Bank of Lind v. Coss*.... 151

SHERIFFS AND CONSTABLES—CONTINUED.

2. **SAME.** The fact that the sheriff had been given an indemnity bond by the plaintiff does not put the sheriff under any obligation to hold the attached property after dissolution of the attachment. *Bank of Lind v. Coss*..... 151

SHIPMENT:

Of liquor into dry unit, see **INTOXICATING LIQUORS.**

SIDEWALKS:

Injuries from defects, see **MUNICIPAL CORPORATIONS, 20.**

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To stock subscription, see **CORPORATIONS, 8, 9.**

STARE DECISIS:

See **COURTS.**

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR, 7-11, 13.**

STATES:

Legislative and judicial power, delegation of, see **CONSTITUTIONAL LAW, 1.**
 Courts, see **COURTS.**

STATUTES:

Building and loan association act, see **BUILDING AND LOAN ASSOCIATIONS.**
 Savings and loan association act as burden upon interstate commerce, see **COMMERCE.**
 Rule of decision, see **COURTS.**
 Challenge to jurors, see **CRIMINAL LAW, 2.**
 Passing of title to property condemned, see **EMINENT DOMAIN, 9.**
 Statute of frauds, see **FRAUDS, STATUTE OF.**
 Sale or gift of liquor to Indians, see **INDIANS.**
 Discharge of inmates of hospitals for insane, see **INSANE PERSONS, 3, 4.**
 Delivery of liquor by carrier in dry territory, see **INTOXICATING LIQUORS.**
 Of limitation, see **LIMITATION OF ACTIONS.**
 Federal employers' liability act, see **MASTER AND SERVANT, 5, 6.**
 Degrees of offense, see **PERJURY, 1.**

1. **STATUTES—TITLES AND SUBJECTS—REVISION—AMENDMENTS.** A statute providing that the filing of claims against a city shall be filed with the city clerk and also comply with all valid city ordi-

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STATUTES—CONTINUED.

nances respecting the subject, does not violate Const., art. 2, § 37, providing that no act shall be amended by mere reference to its title, in that it attempts to embody city charter provisions by reference only. *Haynes v. Seattle*..... 51

STAY:

Pending appeal, see **APPEAL AND ERROR**, 4.

STIPULATIONS:

1. **STIPULATIONS—PLEADINGS AND ISSUES—INSURANCE.** In an action upon a fire insurance policy, in which the value of the property destroyed was placed in issue by a general denial, and an affirmative defense set up false swearing in the proofs of loss, in that the articles enumerated as destroyed were not in the house at the time of the fire, the question of the value of the property under the general issue is not eliminated by a colloquy between court and counsel in respect to the issues, particularly with reference to the matter pleaded in the affirmative defense, in which counsel for plaintiff stated that under the general issue plaintiff would have to prove that he sustained the loss alleged, but there was no charge of false swearing in the proofs of loss as to the value of the articles, and counsel for defendant acceded thereto, stating that if the property was in there, he was not going to state it "was not worth that amount;" the intention evidently being to limit the issue on the affirmative defense, and not eliminate the question of value on the general issue. *David v. Fidelity-Phenix Fire Insurance Co.*.... 242
2. **STIPULATIONS—OPERATION AND EFFECT—ACTIONS—ISSUES—BOUNDARIES.** In an action of ejectment and to quiet title, a stipulation setting forth two deeds, with descriptions of the disputed boundary line, by courses and distances, and reciting that by mesne conveyances, the plaintiffs had succeeded to the right and title conveyed by one of the deeds, and the defendants the other, eliminates the claims of all title by adverse possession by either side to the lands described in the deeds, and reduces the action to one in its essence to restore a lost boundary as contemplated in Rem. & Bal. Code, §§ 947-949. *Snell v. Stelling*..... 248

STOCK:

Bank stock, sale of by bank, see **BANKS AND BANKING**.
 Corporate stock, see **CORPORATIONS**, 2, 3, 5-9.
 Of mutual water company, see **WATERS AND WATER COURSES**, 6-8.

STOCKHOLDERS:

Of bank, see **BANKS AND BANKING**.
 Of corporations, see **CORPORATIONS**.
 In mutual water company, see **WATERS AND WATER COURSES**, 6-9.

STREET RAILROADS:

Carriage of passengers, see **CARRIERS**.

STREETS:

See **MUNICIPAL CORPORATIONS**, 8-10, 13-20, 22.

Accrual of action to restrain change of grade, see **LIMITATION OF ACTIONS**, 2.

SUBMISSION:

Of bond issue to vote, see **MUNICIPAL CORPORATIONS**, 23.

SUBROGATION:

Of obligee in bond to rights of surety, see **PRINCIPAL AND SURETY**.

1. **SUBROGATION—NATURE AND THEORY OF RIGHT—CONTRACT.** Subrogation of a creditor to indemnity given by the principal debtor to a surety for the debt will not be denied on the ground of want of privity of contract, or that it does not grow out of contract, since the right of subrogation will be allowed when the equities of the case demand it. *Johnson v. Martin*..... 364

SUBSCRIPTIONS:

To corporate stock, see **CORPORATIONS**, 5-9.

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Pending appeal, see **DIVORCE**, 3.

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SURFACE WATERS:

See **WATERS AND WATER COURSES**, 1, 2.

SURRENDER:

Of property on dissolution of attachment, see **SHERIFFS AND CONSTABLES**.

SURVEYS:

To establish boundary line, see **BOUNDARIES**.

TAXATION:

Payment of taxes to sustain adverse possession, see **ADVERSE POSSESSION**.

Impressing award paid into court with tax lien, see **EMINENT DOMAIN**, 11.

Effect of statute of limitations on tax title held by county, see **LIMITATION OF ACTIONS**, 3.

TAXATION—CONTINUED.

1. **TAXATION—ASSESSMENT—LIEN—WHEN ATTACHES—GRANTOR AND GRANTEE.** Where an award of damages in eminent domain proceedings was made on January 17, and judgment was entered for the same January 21, but the damages were not paid into court until February 20, so that the title did not pass until February 20, the taxes assessed for the previous year became a lien on the property, as between the parties, on February 3d, under Rem. & Bal. Code, § 9235, making taxes a lien on real estate from March 1st in the year in which they are levied, and providing that, as between grantor and grantee, the lien shall not attach until the first Monday of the following February. *Port of Seattle v. Yesler Estate*..... 166

TERMINATION:

Of water contracts, by public service commission, see **WATERS AND WATER COURSES**, 3-5.

TIME:

For taking exceptions to findings of fact, see **APPEAL AND ERROR**, 5.
For taking exceptions to refusal to give instructions, see **TRIAL**, 1.
For acceptance of contract, see **VENDOR AND PURCHASER**, 5.
For motion for change of judges for bias, see **VENUE**.

TITLE:

See **ADVERSE POSSESSION**.
Acquired in condemnation, when passes, see **EMINENT DOMAIN**, 9, 10.
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Of purchaser at execution sale subsequent to redemption, see **MORTGAGES**, 2.
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Negligence of carrier, see **CARRIERS**.
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TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 7-11, 13.

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Of stock on books of mutual water company, see **WATERS AND WATER COURSES**, 7.

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Exceptions or objections for purpose of review, see APPEAL AND ERROR, 2, 5, 9.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 5-16.

Incorporating instructions in abstract of record, see APPEAL AND ERROR, 16.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 26-38.

Of criminal prosecution, see CRIMINAL LAW.

Instructions as to probable suffering of mental anguish in future, see DAMAGES, 1.

Condemnation proceedings, see EMINENT DOMAIN.

Disputed claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Instructions as to false statements in proofs of loss, see INSURANCE, 3, 4.

Instructions in action for wrongful eviction, see LANDLORD AND TENANT, 7.

Instructions as to burden of proof to show release of claims for injuries, see RELEASE.

Place of trial, see VENUE.

1. TRIAL—EXCEPTIONS—TIME OF TAKING EXCEPTIONS. The purpose of Rem. & Bal. Code, § 339, providing that a party, at any time before the hearing of a motion for new trial, may except to the instructions or any part thereof, being to allow the court to correct error at the time of passing on a motion for a new trial, exceptions to the refusal to give instructions may be taken at the same time and in the same way. *Radburn v. Fir Tree Lumber Co.*..... 643
2. TRIAL—FINDINGS OF FACT—NECESSITY. In an action at law tried by the court, findings of fact and conclusions of law are a necessity, in order to support the judgment of the court, under Rem. & Bal. Code, §§ 367, 368, requiring findings in such cases and providing that they stand as the verdict of a jury, except as qualified as to their weight by § 1736. *Colvin v. Clark*..... 376
3. TRIAL—VERDICT—SEVERAL VERDICTS. In an action by plaintiffs having a common interest in a cause of action for damages for fraudulent representations, the jury may be instructed to return a several verdict as to each plaintiff, under Rem. & Bal. Code, § 364, authorizing the courts to direct special verdicts or findings upon particular facts. *Lebovitz v. Cogswell*..... 174

TROVER AND CONVERSION:

Conversion by lessor or lessee, see **LANDLORD AND TENANT**, 2, 5.

1. **TROVER AND CONVERSION—CONSTRUCTIVE POSSESSION OF DEFENDANT.** Where goods of plaintiff and defendant were stored together in a warehouse, a subsequent sale by the defendant of the goods of both parties to a third person, and removal by the latter, was a conversion, as the sale by defendant constituted a constructive possession and assumption of ownership on his part. *Bickford v. Hupp*... 427
2. **SAME—WHAT CONSTITUTES.** Refusal of a demand for the return of horses intrusted to defendants for use for their keep, for the reason that the horses had been sold, constitutes a conversion. *Donofrio v. Watson Brothers*..... 41
3. **TROVER AND CONVERSION—TITLE OF OWNER—CHATTEL MORTGAGEES.** Chattel mortgagees, placed in possession under an agreement with the mortgagors transferring the title to them, are the owners, and may sue in their own names for a conversion of the chattels. *Donofrio v. Watson Brothers*..... 41
4. **SAME—RIGHT OF ACTION—OWNERSHIP—RIGHT OF POSSESSION.** Chattel mortgagees, to whom the ownership and right of possession had been transferred by the mortgagors, can maintain an action for conversion, without ever having been in possession. *Donofrio v. Watson Brothers* 41
5. **SAME—VALUE—EVIDENCE—ADMISSIBILITY.** In an action for the conversion of a span of horses, evidence of their value at the time they were placed in the hands of the defendants is competent, where there is also evidence that they were of that value at the time of the demand for their return. *Donofrio v. Watson Brothers*..... 41

TRUSTS:

Executor as trustee under nonintervention will, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

1. **TRUSTS—EXECUTION—WANT OF TRUSTEE—EQUITY.** Equity will not permit a trust to fail for want of a trustee, but will seize upon and execute a trust when derelict between debtor and creditor when the subject-matter of the trust has been pledged by the debtor to meet a specific primary obligation of the debtor and but for which the trust would not have been created. *Johnson v. Martin*.... 364

UNITED STATES:

Courts, when decisions controlling in state courts, see **COURTS**.

VACATION:

See **JUDGMENT**, 2-4.

Decree of distribution of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

VALUE:

- Of property lost by fire, evidence of, see **INSURANCE**, 5, 6.
 Evidence of value of property converted, see **TROVER AND CONVERSION**, 5.

VARIANCE:

- In action for injuries to servant, see **MASTER AND SERVANT**, 6.

VENDOR AND PURCHASER:

- Conveyance of mortgaged property, see **MORTGAGES**, 2, 3.
 Transfer of ownership of personal property, see **SALES**.
 Tax lien, when attaches, see **TAXATION**.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUDULENT REPRESENTATIONS—EVIDENCE—SUFFICIENCY.** A sale of land may be rescinded by the vendee for fraud, where the land was 1,700 miles away and had never been seen by the vendee, and there was clear and convincing evidence that the representations of the vendor's agent which induced the sale were to the effect that the land was in the heart of a German Catholic settlement, and were made knowing that to be a material fact in the mind of the vendee, who was of that faith and bought in order to have a home in such a community, when in fact, the whole country was an unsettled wilderness; and it is immaterial that the vendee did not intend to go there for a year or two. *Becker v. Clark*..... 37
2. **SAME.** In such a case, the breach of promissory representations that a church would be built there the following year is immaterial except as it threw light on the other representations, and so does not remit the purchaser to an action for damages. *Becker v. Clark* 37
3. **VENDOR AND PURCHASER—CONTRACT—DELIVERY.** Delivery of a contract for the sale of land is not shown by the fact that the vendor handed it to the vendee with other papers, except the executed deed, for examination, and for which the vendor was to receive certain other lands, cash, and notes, and no tender of performance was made by the vendee for months. *Brown Brothers Lumber Co. v. Preston Mill Co.* 648
4. **SAME—DELIVERY—PRESUMPTIONS—INTEREST.** The *prima facie* evidence of delivery from the fact of possession of an executory contract for the sale of land is less stringent than in the case of executed contracts; and whether there was a complete delivery depends on the intention of the parties, construed according to practical business rules. *Brown Brothers Lumber Co. v. Preston Mill Co.* 648
5. **SAME—CONTRACTS—ACCEPTANCE—REASONABLE TIME—ESTOPPEL.** Where a deal for the sale of timber lands required the vendee to purchase the interest of a third party in other lands to be given in

VENDOR AND PURCHASER—CONTINUED.

exchange, notwithstanding which the vendee was notified that the deal ought to be closed within a month, and for three months the vendor constantly tried to have the deal closed, when it notified the vendee that it must be closed within one week, a reasonable time was given to the vendee to close the deal, in the absence of any explanation or excuse for the long delay; hence the vendor was not estopped from refusing to carry out the contract three weeks later when the vendee, having acquired the third party's interest, finally tendered performance. *Brown Brothers Lumber Co. v. Preston Mill Co.* 648

VENUE:

Change for bias of judge, see JUDGMENT, 2.

1. VENUE—CHANGE—BIAS OF JUDGE—TIME FOR APPLICATION. A motion for a change of judges on account of bias of the judge is timely, where it was made as soon as the cause had been assigned under the rules of court by the presiding judge to a judge of a particular department for trial, although it had been previously assigned for trial on a day certain without designating any department or judge. *Cooper v. Cooper* 85

VERDICT:

Harmless error in directing several instead of joint verdict, see APPEAL AND ERROR, 37.

As against codefendant, consistency, see CRIMINAL LAW, 5.

Inadequate or excessive damages, see DAMAGES, 4, 5.

In action on fire insurance policy, amount of recovery, see INSURANCE, 7.

Judgment *non obstante*, see JUDGMENT, 1.

In civil actions in general, see TRIAL, 3.

VESTED RIGHTS:

Equal protection of laws, see CONSTITUTIONAL LAW, 4.

WAIVER:

See ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 20, 21, 27.

Of objection that complaint does not state cause of action, see PLEADING.

By stipulation, see STIPULATIONS.

Of constitutional guaranty against being compelled to be witness against himself, see WITNESSES, 3.

WARNING:

To servant of defective appliance, see MASTER AND SERVANT, 1.

WARRANTY:

On sale of goods, see SALES, 5.

WATERS AND WATER COURSES:

1. **WATERS AND WATER COURSES—OBSTRUCTION—LIABILITY—UNPRECEDENTED EVENTS—INSTRUCTIONS.** While a riparian proprietor, in backing up the waters of a stream so as to cover his own land, is not bound to anticipate unprecedented rainfalls or such as has not occurred within the memory of man, he is not entitled to an instruction to cover his nonliability in such event where the evidence tended to show that the rainfall for the month in question was greater in 1900 than in 1912, the year in question, neither of which could be said to be, as a matter of law, unprecedented or even extraordinary. *Radburn v. Fir Tree Lumber Co.*..... 643
2. **WATERS AND WATER COURSES—OBSTRUCTION—ACTION FOR DAMAGES—INSTRUCTIONS.** In an action for obstructing a stream and overflowing plaintiff's lands, damaging the crops, in which there was evidence of an abnormal rainfall at the time in question, it is error to refuse to give a requested instruction to the effect that, if the jury found that plaintiff's crops had been damaged by rain as well as by defendant's acts, the defendant would only be liable for such part of the damage as was caused by his acts. *Radburn v. Fir Tree Lumber Co.* 643
3. **WATERS AND WATER COURSES—WATER COMPANIES—REGULATION—RATES—CONTRACTS—POWER OF COMMISSION.** Agreements made by a water company, in acquiring all the water supply of mill companies without reservation, to furnish the mill companies with water for a stated period, free or at reduced rates, are not either void or voidable under the terms of the public utilities act, subsequently enacted, 3 Rem. & Bal. Code, § 8626-1 *et seq.*, prohibiting preferences and discrimination between patrons, in view of the proviso that nothing in the act shall prevent any water company from continuing to furnish its product or service under any contract in force at the date this act takes effect, thereby excepting such prior contracts; and § 8626-34 of the act authorizing the commission, in its discretion, to direct by order that such contracts shall be terminated by the company, as and when directed by such order, does not authorize the commission to terminate the contracts, but only authorizes a termination of such contracts, if legal, by the consent of the parties or such legal proceedings by the company as may be proper. *State ex rel. Raymond Light & Water Co. v. Public Service Commission* 130
4. **SAME—REGULATION—LEGAL CONTRACTS—JURISDICTION—ORDERS OF COMMISSION.** Upon an application by a city alleging unreasonable and excessive rates and inadequate service by a water company, which had obligated itself, in the acquisition of its water supply, to furnish free water to the owners of the water, the public service commission has jurisdiction to determine the issues presented between the city and the water company as to the reasonableness of

WATERS AND WATER COURSES—CONTINUED.

rates and adequacy of service; and under its discretionary power to order the termination of any such contract for free water, its order to that effect will be construed as a direction to the water company to take steps to terminate such contracts, if the contracts were legal and binding. *State ex rel. Raymond Light & Water Co. v. Public Service Commission* 130

5. **SAME—REGULATION — CONTRACTS — TERMINATION — DISCRETION OF COMMISSION.** Since, by Rem. & Bal. Code, § 8626-34, it is discretionary for the public service commission to order the termination of contracts for the supply of water entered into prior to the taking effect of the act, the commission may, after ordering the termination of contracts for free water, upon the intervention of the parties interested, vacate its order, where it appears that the water company's deed for its water supply and the contracts for free water to the grantors in such deed were parts of one and the same transaction, and that one was the consideration for the other. *State ex rel. Raymond Light & Water Co. v. Public Service Commission*.. 130
6. **WATERS AND WATER COURSES—IRRIGATION—MUTUAL WATER COMPANIES—WATER AS APPURTENANT TO LAND—RIGHTS OF LESSEE.** The owner of shares of stock in a mutual water company, each of which constitutes a water right for one acre of land, entitling him to a given quantity of water actually carried in the company canal for the irrigation of the lands described in the certificate, holds such water right as appurtenant to his land; and provisions in a lease of the land, showing an intent of the parties that the lessee should be entitled to one-half the water right of the lessor, would operate as an assignment of the water right and pass same to the lessee as an appurtenance to the land; thus placing the lessee in such privity to the contract between the owner of the land and the water company as would entitle him to a right of action against the water company for negligence in failing to properly maintain and keep in repair the irrigation ditch. *Berg v. Yakima Valley Canal Co.* 451
7. **SAME—MUTUAL WATER COMPANIES—TRANSFER OF STOCK ON BOOKS —NECESSITY.** The failure of a holder of stock in a mutual water company to have the same transferred to his name upon the books of the corporation, after sale and assignment to him, would not affect the right of a lessee of the land and water rights to maintain an action against the company for negligence, where the company had already recognized the rights of his lessor by furnishing him the amount of water represented by his stock, and had never refused to furnish the lessee on the ground that the stock had not been transferred on the books of the corporation. *Berg v. Yakima Valley Canal Co.*..... 451
8. **SAME—FAILURE TO FURNISH WATER — NEGLIGENCE—LIABILITY.** A mutual water company organized for the purpose of supplying water to its stockholders is required to exercise reasonable care in main-

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taining its ditch in proper repair and in furnishing each stockholder his proportionate share of water, and failure therein constitutes negligence for which it may be made to respond in damages at the suit of a stockholder or of a lessee in privity with him. *Berg v. Yakima Valley Canal Co.*..... 451

9. **SAME—NEGLIGENCE—EVIDENCE — SUFFICIENCY.** Negligence in the maintenance and operation of an irrigation ditch is established where it appears that the company failed to clean out the ditch in the fall when it had a right to shut off the water for the purpose of cleaning out and making repairs; that no repair work was done during the winter, but was put off until spring, and then the water was shut off for repairs in disregard of the rights of patrons; that defendant did not supply the plaintiff with his proportionate share of the water that came down the ditch, but permitted stockholders occupying lands further up the ditch to take more than they were entitled to, and that by reason thereof plaintiff lost a large portion of his nursery stock. *Berg v. Yakima Valley Canal Co.*..... 451

WIDOWS:

Allowance to, see **EXECUTORS AND ADMINISTRATORS, 2.**

WILLS:

See **EXECUTORS AND ADMINISTRATORS, 3, 4.**

1. **WILLS — TESTAMENTARY DISPOSITION — PROPERTY SUBJECT — COMMUNITY PROPERTY.** Community property is subject to testamentary disposition, to the extent of the testator's one-half interest, under Rem. & Bal. Code, §§ 1319 and 1342. *German-American State Bank of Ritzville v. Godman*..... 231
2. **SAME—PROPERTY SUBJECT—PROCEEDS OF LIFE INSURANCE.** Where policies of life insurance are payable to the insured's "executors, administrators, or assigns," or to "the estate of the insured" or to his "legal representatives," the proceeds are subject to testamentary disposition; the words legal representatives meaning ordinary executors or administrators, and not differentiated from "the estate" in this connection. *German-American State Bank of Ritzville v. Godman* 231
3. **WILLS — REVOCATION — MARRIAGE — PROVISION FOR WIFE.** Under Rem. & Bal. Code, § 1323, providing that marriage revokes a prior will of the testator, if the wife shall be living at the time of his death, unless provision shall have been made for her by marriage settlement or the wife be provided for or mentioned in the will, an understanding before marriage that, when either should die, the survivor should have no interest in the decedent's estate, is not a "provision" for the wife by marriage settlement which could toll the revocation of the will. *Koontz v. Koontz*..... 180

WILLS—CONTINUED.

4. WILLS—CONTEST—FORGERY—EVIDENCE—SUFFICIENCY. In a contest of a will on the ground of forgery of the testatrix's signature, evidence examined and found to sustain the finding of the lower court in favor of the validity of the will. *In re Brown's Estate*..... 528
5. WILLS—CONSTRUCTION—PAROL EVIDENCE. A will that is clear, definite and free from ambiguity cannot be either limited or extended by resort to parol testimony. *German-American State Bank of Ritzville v. Godman*..... 231
6. WILLS—CONSTRUCTION—DIRECTION TO PAY DEBTS—APPROPRIATION—EXEMPT PROPERTY—INTENT. A general direction in a will to pay "all my lawful debts and the expenses of my funeral," is not an appropriation of the proceeds and avails of the decedent's life insurance policies which were payable to his executors, administrators, or assigns, or to his estate or legal representatives, in view of Rem. & Bal. Code, § 569, exempting such proceeds from all liability for any debts; since an intent to appropriate exempt property to the payment of debts must appear by clear and apt language, and the quoted words are but a common formula of wills respecting the payment of debts with funds legally applicable thereto. *German-American State Bank of Ritzville v. Godman*..... 231

WITNESSES:

Examination of as comment on evidence, see CRIMINAL LAW, 3, 6.
Perjury, see PERJURY.

1. WITNESSES—CROSS-EXAMINATION—CHARACTER WITNESS. In the cross-examination of character witnesses for the defendant in a criminal prosecution, it was not misconduct on the part of counsel to question such witnesses as to whether they did not know that defendant had been guilty of some misconduct and had lived with and associated with people of questionable character. *State v. Austin* 444
2. WITNESSES—PRIVILEGE—RIGHTS OF ACCUSED—CONFLICT OF CONSTITUTIONAL AND STATUTORY PROVISIONS. Although the rules of practice in civil cases, in the absence of a special statute, are made the rule of practice in criminal cases, such statutory rules cannot be given effect where their operation would contravene the constitutional guaranty for the protection of a defendant, on trial in a criminal case, that he shall not be compelled to be a witness against himself. *State v. Jackson* 514
3. SAME—SELF-INCRIMINATION—WAIVER. Where the state has placed the accused under the imputation of guilt by demanding on the trial that he produce certain documents, the defendant does not waive objection to the violation of his constitutional guaranty against be-

WITNESSES—CONTINUED.

ing compelled to be a witness against himself by subsequently taking the stand in his own behalf and testifying as to the matters inquired into; since placing him under the imputation of guilt forces him to take the stand and he is not a voluntary witness. *State v. Jackson* 514

4. WITNESSES — IMPEACHMENT — REDIRECT EXAMINATION — SCOPE. Where, on laying the ground for the impeachment of a witness, the witness denied making any such statement as was imputed to her, it is not prejudicial error to refuse to allow the witness, on redirect at that time, to detail a conversation held at the time in question; especially where, after the direct impeachment of the witness, she was not called in rebuttal to give her version of the matter, and no excuse was given for failing to recall her. *Pierce v. Seattle Electric Co.* 141

5. WITNESSES—IMPEACHMENT—REPUTATION OF WITNESS—IMMORALITY. For the purpose of impeaching a female witness for the state, it is error to refuse to allow the defendant to prove her general reputation for morality in the neighborhood in which she lives. *State v. Jackson* 514

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR—QUANTUM MERUIT—EFFECT OF EXCESSIVE PRICE—ACTIONS—ISSUES—INSTRUCTIONS. In an action to recover the reasonable value of machinery ordered and accepted by the defendants, upon issues as to whether the goods were ordered from plaintiff by defendants and accepted by defendants, and their reasonable value, it is error to instruct the jury that, if they find that the machinery was ordered by defendants, and manufactured and delivered by plaintiff to defendants, they must find for the plaintiff, unless the jury further found that plaintiff charged for the same in excess of the reasonable value thereof; because, if the machinery was ordered, delivered to, and accepted by defendants, they would be liable for the reasonable value thereof, regardless of the price asked. *Nordeen Iron Works v. Rucker* 126
2. SAME—QUANTUM MERUIT—ISSUES AND PROOF—INSTRUCTIONS. In an action to recover the reasonable value of machinery delivered to, and accepted by the defendants, upon issues as to whether the goods were ordered from plaintiff by defendants, and accepted by defendants, and their reasonable value, it is error to instruct the jury that if they find defendants could have purchased the machinery on the open market for considerably less than the amount claimed by plaintiff, they could take that fact into consideration in determining whether or not there was a contract entered into between the plain-

WORK AND LABOR—CONTINUED.

tiff and defendants; since there was no contract in issue and no price had been agreed upon, making the instruction confusing and misleading. *Nordeen Iron Works v. Rucker*..... 126

WRITINGS:

Parol evidence to vary or explain, see EVIDENCE, 6, 7.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

WRITS:

See CERTIORARI; PROCESS.

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